

EVE H. KARASIK (State Bar No. 155356)
JOHN-PATRICK M. FRITZ (State Bar No. 245240)
ROBERT M. CARRASCO (State Bar No. 334642)
LEVENE, NEALE, BENDER,
YOO & GOLUBCHIK L.L.P.
2818 La Cienega Avenue
Los Angeles, California 90034
Telephone: (310) 229-1234
Facsimile: (310) 229-1244
Email: EHK@LNBYG.COM; JPF@LNBYG.COM; RMC@LNBYG.COM

Proposed Attorneys for Chapter 11
Debtor and Debtor in Possession

**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION**

| | |
|----------------------------------|--|
| In re: |) Case No.: 2:24-bk-11857-DS |
| |) |
| BEN NYE CO., INC., |) Chapter 11 Case |
| |) Subchapter V |
| Debtor and Debtor in Possession. |) |
| |) NOTICE OF MOTION AND MOTION |
| |) FOR AN ORDER: (1) SETTING BAR |
| |) DATES FOR FILING PROOFS OF |
| |) CLAIM ARISING FROM ASSERTED |
| |) ASBESTOS RELATED INJURIES AND |
| |) (2) APPROVING FORM AND MANNER |
| |) OF NOTICE OF THE BAR DATE FOR |
| |) THE FILLING OF ASSERTED |
| |) ASBESTOS RELATED INJURY PROOF |
| |) OF CLAIMS; MEMORANDUM OF |
| |) POINTS AND AUTHORITIES; |
| |) DECLARATION OF DANA NYE IN |
| |) SUPPORT THEREOF |
| |) |
| |) <u>Hearing:</u> |
| |) Date: April 11, 2024 |
| |) Time: 3:00 p.m. |
| |) Place: Courtroom 1639 |
| |) 255 East Temple Street |
| |) Los Angeles, CA 90012 |
| |) |
| |) |
| |) |
| |) |
| |) |
| |) |

TABLE OF CONTENTS

| | |
|--|----|
| MEMORANDUM OF POINTS AND AUTHORITIES | 3 |
| I. STATEMENT OF FACTS | 3 |
| A. General Background | 3 |
| B. The 2017 BNC Revenue Rise and Challenges Thereafter | 4 |
| C. Asbestos Lawsuits against BNC | 5 |
| D. Proposed Bar Date for Filing Proofs of Claim Asserted Asbestos Related Injuries and Related Form and Manner of Notice | 6 |
| II. ARGUMENT | 9 |
| A. The Debtor’s Proposed Notice Process Complies with the Federal Rules of Bankruptcy Procedure for Setting the Asserted Asbestos Claims Bar Date and the Form and Manner of Notice of such Claims Bar Date | 9 |
| B. A Robust Bar Date Publication Notice Process Can Bind Future Claimants of Asserted Asbestos Claims to the Asserted Asbestos Claim Bar Date | 10 |
| III. CONCLUSION | 13 |
| DECLARATION OF DANA NYE | 15 |
| A. General Background | 15 |
| B. The 2017 BNC Revenue Rise and Challenges Thereafter | 17 |
| C. Asbestos Lawsuits against BNC | 18 |
| D. Proposed Asserted Asbestos Claims Bar Date and Notice Process | 19 |

TABLE OF AUTHORITIES

Page(s)

Federal Cases

| | |
|---|--------|
| <i>In re Caracciolo</i> , No. ADV. 05-90348-H11, 2006 WL 6604324 (Bankr. S.D. Cal. Dec. 13, 2006) | 11 |
| <i>Estate of Decedent Luciano Susino and All Other Statutory Beneficiaries of Decedent Luciano Susino to Allow the Filing of A Late Proof of Claim</i> , Case No. 12-200000-MFW (Bankr. D. Del., Oct. 18. 2021) (ECF No. 4601) | 12 |
| <i>In re Energy Future Holdings</i> , 949 F.3d 806 (3d. Cir. 2020) | 11, 12 |
| <i>In re Grossman's</i> , 607 F.3d 114 (3d Cir. 2010) | 10 |
| <i>Mullane v. Central Hanover Bank & Trust Co.</i> , 339 U.S. 306, 70 S.Ct. 652 (1850) | 11 |
| <i>In re Overseas Shipholding, LLC</i> , Case No. 12-20000, Transcript of Court Decision (Bankr. D. Del., Oct. 18. 2021) (ECF No. 4612) | 13 |
| <i>In re Placid Oil Co.</i> , 753 F.3d 151 (5th Cir 2014) | 11, 12 |
| <i>Tulsa Professional Collection Serv., Inc. v. Pope</i> , 485 U.S. 478 (1988) | 11 |

Other State Cases

| | |
|--|----|
| <i>In re Overseas Shipholding, LLC</i> , Case | 14 |
|--|----|

Federal Statutes

| | |
|-----------------|----|
| 11 U.S.C. | |
| § 1182(1) | 15 |
| § 1183(a) | 3 |

Bankruptcy Code

| | |
|---------------------------|-----------------------|
| § 363(m) | 12 |
| § 524(g) | 7, 10, 11, 12, 13, 19 |
| §§ 1107 and 1108 | 3 |
| §§ 1182(2) and 1184 | 3, 15 |

Other Authorities

| | |
|--|-------|
| Fed.R.Bankr. P. 2002(a)(7) and (f) | 9 |
| Fed R. Bankr. P. 2002(l) | 10 |
| Fed. R. Bankr. P. 3003(c)(2) | 9, 10 |
| Fed. R. Bankr.P. 3003(c)(3) | 9 |
| Local Bankruptcy Rule 9013-1(f) | 1 |
| Local Bankruptcy Rule 9013-1(h) | 2 |

1 **TO THE HONORABLE DEBORAH J. SALTZMAN UNITED STATES**
2 **BANKRUPTCY JUDGE, THE OFFICE OF THE UNITED STATES TRUSTEE, ALL**
3 **PARTIES REQUESTING SPECIAL NOTICE, AND OTHER INTERESTED PARTIES:**

4 **PLEASE TAKE NOTICE** that a hearing will be held on April 11, 2024 at 11:30 a.m.,
5 before the Honorable Deborah J. Saltzman, United States Bankruptcy Judge for the Central
6 District of California, Los Angeles Division, via ZoomGov, for the Court to consider the motion
7 (the “Motion”) filed by Ben Nye Co., Inc. the debtor and debtor in possession in the above-
8 captioned chapter 11 bankruptcy case (the “Debtor”) for an order (1) setting bar dates for filing
9 proofs of claim arising from known and future asserted asbestos related injuries and (2)
10 approving form and manner of notice of the bar date for the filling of known or future asserted
11 asbestos related injury proofs of claim. (There will be different bar dates set and noticed for
12 claims that are not asserted asbestos related injury proofs of claims.)

13 **PLEASE READ THIS DOCUMENT CAREFULLY TO DETERMINE THE BASIS**
14 **FOR THE REQUESTED RELIEF.** The specific grounds for the Motion are set forth in detail
15 in the attached Memorandum of Points and Authorities and Declaration of Dana Nye.

16 **PLEASE TAKE FURTHER NOTICE** that the hearing on the Motion will be
17 conducted via ZoomGov. Accessibility information to enable parties to appear at the hearing via
18 ZoomGov will be provided by the Court in its tentative ruling prior to the hearing. Parties may
19 obtain such accessibility information on the Court’s posted hearing calendar which may be
20 viewed online at <http://ecf-ciao.cacb.uscourts.gov/CiaoPosted/?jid=SC>. Any parties that wish to
21 appear in person must notify the Courtroom Deputy at least 24 hours before the hearing.

22 **PLEASE TAKE FURTHER NOTICE** that, pursuant to Local Bankruptcy Rule 9013-
23 1(f), any response to the Motion must be in writing and filed with the Clerk of the Bankruptcy
24 Court and served upon the United States Trustee and counsel for the Debtor at the address set
25 forth in the upper left-hand corner of the first page hereof not later than fourteen (14) days prior
26 to the scheduled hearing date set forth above.

27 ///

1 **PLEASE TAKE FURTHER NOTICE** that, pursuant to Local Bankruptcy Rule 9013-
2 1(h), the Court may deem the failure of a party in interest to file a timely response to the Motion
3 to constitute consent to the granting by the Court of the relief requested by the Debtor in the
4 Motion without further notice or hearing.

5 Dated: March 21, 2024

BEN NYE CO., INC.

6
7 By: _____



EVE H. KARASIK
JOHN-PATRICK M. FRITZ
ROBERT M. CARRASCO
LEVENE, NEALE, BENDER, YOO
& GOLUBCHIK L.L.P.

Proposed Attorneys for Debtor and Debtor in
Possession

MEMORANDUM OF POINTS AND AUTHORITIES

I.

STATEMENT OF FACTS

A. General Background.

1. Ben Nye Co., Inc. (the “Debtor”) filed a voluntary petition for relief under Subchapter V of Chapter 11 of 11 U.S.C. §§ 101 *et seq.* (the “Bankruptcy Code”) on March 11, 2024 (the “Petition Date”). The Debtor continues to manage its financial affairs and operate their bankruptcy estates as a debtor in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

2. The United States Trustee (the “UST”) is expected to appoint a subchapter V trustee (the “Trustee”) pursuant to 11 U.S.C. § 1183(a).

3. The Debtor continues to manage its financial affairs, operate its business, and administer its bankruptcy estate as a debtor in possession pursuant to sections 1182(2) and 1184 of the Bankruptcy Code.

4. The Debtor was founded in 1966 by Ben Nye, Sr., a renowned make-up artist whose career spanned four decades.

5. Ben Nye Sr. served as makeup director of 20th Century Fox Studio (“Fox Studio”) for 23 years and supervised the production of over 500 feature films. He worked on the iconic "Gone with the Wind", making up Olivia de Havilland, Leslie Howard and Hattie McDaniel, the first Black actor to win an academy award. In 1968, Ben Nye Sr. was awarded a special Academy Award for Makeup for his last film work on "Planet of the Apes."

6. Based on his vast experience, Ben Nye Sr. developed his own line of professional cosmetics especially formulated for high intensity lighting and durability. He also designed make-up for every skin tone, including a complete line for Black, Hispanic and Asian performers. After he retired from Fox Studio in 1967, he began selling his own line of makeup primarily to film studios.

7. In 1970, Ben Nye Sr.’s son, Dana Nye, joined the company as Vice President of Sales and began marketing the Ben Nye make-up line to college and high school drama

1 departments across the country. The Company began advertising in Theatre Craft, an industry
2 magazine circulated to drama departments and theatre companies and began exhibiting at trade
3 shows catering to costume shops and contacting theatre supply houses. Over the years, the
4 Company developed an extensive line of student makeup kits designed for the educational theatre
5 marketplace.

6 8. In May 1975, Ben Nye Sr.'s health declined, and Dana Nye become the Company's
7 President. In July 1979, Dana Nye purchased all of the Company's shares and became the sole
8 shareholder until March 2020, when Dana Nye assigned his BNC shares to the "Dana Nye and
9 Gina Nye, as trustees of the Nye Family Trust U/T/D April 11, 2012."

10 9. As president, Dana Nye has been dedicated to enhancing the quality and image of
11 BNC products. He has traveled extensively exhibiting at trade shows and building a network of
12 authorized dealers, who own brick and mortar stores marketing to the performing arts. The
13 Company's market has not been directed toward the general public, commonly referred to
14 "streetwear" make up.

15 10. The Company is a family business with a good work environment. Of its 35
16 employees, 16 employees have worked there between 11 to 38 years. Excluding the owners, the
17 average service tenure is 13 years. The knowledge and productivity of its employees has been
18 instrumental in developing new products, improving product quality and providing excellent
19 product delivery.

20 11. Today, the Company is considered a leading manufacturer of professional
21 **cosmetics, which are sold throughout the United States and abroad. It is recognized for its**
22 **high** quality, extensive product line and excellent customer service.

23 **B. The 2017 BNC Revenue Rise and Challenges Thereafter**

24 12. In 2013, the Company had gross revenues of \$8,732,138. In a 2014 interview Kim
25 Kardashian's make-up artist mentioned he used the Company's banana powder on Kim. Given
26 Kim Kardashian's celebrity star status, this interview sparked a surge in public demand for the
27 Company's banana powder and boosted sales of other Company products, resulting in 2014 gross
28 revenue of \$10,157,999. In response, however, most of the Company's competitors copied the

1 banana powder, and Kim Kardashian introduced her own line of make-up, as well, cutting deeply
2 into the Company's sales for the next few years. By 2017, the unusually high demand for BNC
3 products subsided, and BNC revenue fell back to the 2013 levels.

4 13. By 2018, long-time brick and mortar dealers began to retire or close business in
5 response to e-commerce. The Company's largest dealers transitioned to expand their on-line
6 business. For the first time, the Company's revenue started to decline, but the business remained
7 marginally profitable.

8 14. In 2020, the impact of the Covid-19 pandemic, hit the Company very hard.

9 15. Covid-19 restrictions shut down the performing arts, and colleges, universities, and
10 Halloween activities stopped. The Covid-19 revenue impact on the Company's business was
11 devastating as the Company's gross revenues fell 42% from the prior year.

12 16. Despite terminating 25% of the Company workforce, managers taking payroll cuts,
13 and the Company cutting all expenses to the bone, the Company incurred a significant net loss of
14 \$718,304 in 2020.

15 17. In the second half of 2021, Covid-19 restrictions eased, and the business started to
16 slowly recover. Although 2021 revenue fell back to the 2005 level, the Company managed an
17 operating income of \$258,102. The Company's net income was significantly boosted to
18 \$2,045,644 from two forgiven PPP loans totaling \$1,182,014, and ERTC filings of \$645,865.

19 18. In 2023, the Hollywood writers' and actors' strikes and an exceptionally weak
20 Halloween season adversely affected the Company's revenue, which declined to \$5,554,300 from
21 \$5,809,725 in 2022.

22 **C. Asbestos Lawsuits against BNC**

23 19. In December 2004, the Company received a lawsuit filed by Ms. Audrey Giero
24 claiming personal injury from alleged exposure to asbestos allegedly in the Company face powder
25 she used. This was the first lawsuit against the Company for any personal injury claimed from its
26 products. The Company did intensive research and found no evidence of asbestos in its products.
27 The Company did not have insurance for this type of claim and spent about \$50,000 in its defense.
28 The case was dismissed in 2005 without settlement.

20. Seventeen years later, and still while weathering the impact of Covid-19, in July 2021, the Company received its second lawsuit filed by Mr. David Rody claiming personal injury from alleged exposure to asbestos allegedly in BNC face powder he had used. The Company denies that it manufactured face powders that contained talk with asbestos. In the Rody case, the Company was among 60 defendants and vigorously defended its position, spending \$513,929 in legal fees, including a settlement of \$37,500 in May 2023.

21. Since July 2021, the Company has been named as a defendant in eight (8) more asbestos lawsuits. In these lawsuits, the Company is named with multiple defendants, including many very large well-known companies, (e.g., Maybelline LLC, Kaiser Gypsum Company, Inc., and Walgreen, Co., among many others).

22. Asbestos related personal injury lawsuits are complex and expensive to defend, and the Company has no insurance for its defense. The Company legal fees defending these cases have steadily risen. The Company incurred related legal fees of \$62,513 in 2021, \$301,945 in 2022, and \$407,289 in 2023. These continued legal fees are unsustainable for the Company. The twin burdens of legal fees and revenue decline outside of the Company's control resulted in a net income loss of \$453,102 for the year ending December 31, 2023. As a result the cash position has been substantially depleted. The Company is a defendant in an asbestos trial scheduled for April 15, 2024, in California. Legal counsel has advised the Company that this trial is likely to incur legal fees between \$400,000 and \$500,000. Such an amount will fully exhaust the Company's present cash position and effectively stop its ability to operate. Furthermore, the Company would not have any resources to defend against its remaining lawsuits.

D. Proposed Bar Date for Filing Proofs of Claim Asserted Asbestos Related Injuries and Related Form and Manner of Notice.¹

23. As described above, the Debtor was compelled to file this chapter 11 bankruptcy case due to the filing of eight (8) lawsuits (the "Actions") filed by plaintiffs with asserted asbestos related injuries arising out of alleged exposure to certain of the Debtor's products. In bankruptcy

¹The Debtor will be filing a separate motion to set bar dates and approve the form and manner of notice for claims that are not asserted asbestos related injury proofs of claims.

cases with asserted asbestos related injury claims (“Asserted Asbestos Claims”), the claims of future claimants must be addressed as asbestos related injuries arise many years after exposure to the asbestos containing product. In the usual bankruptcy case with Asserted Asbestos Claims, the debtor has insurance and/or other sources of funding for these claims and proposes a plan of reorganization under section 524(g) of the Bankruptcy Code (“Section 524(g) Plan”). Under a Section 524(g) Plan where a debtor has insurance coverage for the Asserted Asbestos Claims, contributions from the insurers primarily fund a trust created through the Section 524(g) Plan to pay approved Asserted Asbestos Claims (the “Section 524(g) Trust”). In exchange for the insurer’s contributions to the Section 524(g) Trust, the contributing insurers receive the benefit of a channeling injunction that bars claimants holding Asserted Asbestos Claims from bringing actions against the contributing insurers. The debtor engages actuaries to estimate the number of potential future claimants and then establishes a payment percentage of the Section 524(g) Trust funds to be made to holders of approved existing Asserted Asbestos Claims so that existing and future claimants holding approved Asserted Asbestos Claims receive substantially similar recoveries.

24. Here, the Debtor is unaware that it owns any insurance policies that would provide coverage for the Asserted Asbestos Claims. As will be evidenced in the Debtor’s to be filed Schedules of Assets and Liabilities, the Debtor is a very small company and has insufficient assets and no source of funding for a Section 524(g) Plan. Accordingly, it is not possible for the Debtor to propose a Section 524(g) Plan.

25. Based on the authorities cited below, the Debtor can bind future claimants to a current claims bar date without a Section 524(g) Plan if it engages in a robust claims bar date notice process that includes publication notice. Accordingly, the Debtor proposes that the Court approve the following proposed claims bar date notice process for holders of all existing and future Asserted Asbestos Claims (the “Proposed Notice Process”):

- A claims bar date for Asserted Asbestos Claims (the “Asserted Asbestos Claims Bar Date”) that provides at least 45 days’ notice of the deadline to file proofs of claim, i.e., May 26, 2024.

- 1 • The detailed form of notice of the bar date solely for Asserted Asbestos
2 Claims (the “Bar Date Notice”) attached to the Nye Declaration as **Exhibit**
3 **A.**
- 4 • Service of the Bar Date Notice by first class U.S. Mail on all of the Debtors’
5 existing and former employees, dealers, and the plaintiffs’ counsel in the
6 Actions.
- 7 • Publication of the Bar Date Notice in the following publications:
 - 8 i. New York Times – National Edition; publish one time no later than
9 two weeks after entry of the order granting this Motion (the
10 “Order”);
 - 11 ii. Los Angeles Times – publish on two dates (no later than two (2)
12 weeks after entry of the Order, and no later than four (4) weeks after
13 entry of the Order);
 - 14 iii. Variety -- publish on two dates (no later than two (2) weeks after
15 entry of the Order, and no later than four (4) weeks after entry of the
16 Order);
 - 17 iv. Mealey’s Litigation Report Asbestos -- publish on three dates (no
18 later than two (2) weeks after entry of the Order, four (4) weeks
19 after entry of the Order, and five (5) weeks after entry of the Order,
20 respectively); and
 - 21 v. Mealey’s Asbestos Bankruptcy Reports -- publish on three dates
22 (no later than two (2) weeks after entry of the Order, four (4) weeks
23 after entry of the Order, and five (5) weeks after entry of the Order,
24 respectively)

25 26. The Debtor believes that the Proposed Notice Process is robust and will provide
26 both existing and future claimants holding Asserted Asbestos Claims more than adequate notice of
27 the Asserted Asbestos Claims Bar Date. The Proposed Notice Process includes a detailed Bar Date
28 Notice that provides all known and future holders of Asserted Asbestos Claims with the

information they need to timely file a proof of claim in the Debtor's bankruptcy case, including the Asserted Asbestos Claim Bar Date, who must file a proof of claim, the filing procedures, the consequences of failing to timely file a proof of claim, and where parties can find further information regarding the Debtor's bankruptcy case. The Debtor will mail the Bar Date Notice directly to known potential holders of Asserted Asbestos Claims by first class U.S Mail. In addition, the Debtor proposes to publish the Bar Date Notice in five (5) publications consisting of a national newspapers (the New York Times) the regional newspaper for the area where the Debtor's manufacturing facility is located (the Los Angeles Times), one of the leading entertainment journals as the Debtor manufactures theatrical make-up (Variety), and two (2) asbestos litigation reporting services used regularly by plaintiffs' firms that bring Asserted Asbestos Claims actions (Mealey's Asbestos Litigation Reports Asbestos and Mealey's Asbestos Bankruptcy Reports). The Debtor proposes to publish the Bar Date Notice multiple times in a 45 day period. The expansive Proposed Notice Process is specifically designed to notify all known and future holders of potential Asserted Asbestos Claims of the Asserted Asbestos Claims Bar Date.

II. ARGUMENT

A. **The Debtor's Proposed Notice Process Complies with the Federal Rules of Bankruptcy Procedure for Setting the Asserted Asbestos Claims Bar Date and the Form and Manner of Notice of such Claims Bar Date.**

There are several Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") that govern the setting of a claims bar date in a bankruptcy case, and the required form and manner of providing notice of that bar date to creditors. Bankruptcy Rule 3003(c)(3) provides that the Court "shall fix . . . the time within which proofs of claim . . . may be filed" by establishing filing deadlines. Fed. R. Bankr.P. 3003(c)(3). Pursuant to Bankruptcy Rule 3003(c)(2), a creditor must file a proof of claim by the applicable deadline established by the Court if that creditor's claim (a) is not listed in the debtor's schedules of assets and liabilities (the "Schedules") or (b) is listed in the Schedules as disputed, contingent, or unliquidated. Fed. R. Bankr. P. 3003(c)(2).

Pursuant to Bankruptcy Rules 2002(a)(7) and (f) the Debtor must provide 21 days' notice by mail to all creditors of the deadline to file claims. Fed.R.Bankr. P. 2002(a)(7) and (f). Here,

the Debtor's Proposed Notice Process will provide 45 days' notice of the Asserted Asbestos Claim Bar Date.

Bankruptcy Rule 2002(l) provides that "[t]he court may order notice by publication if it finds that notice by mail is impracticable or that it is desirable to supplement the notice." Fed R. Bankr. P. 2002(l). Such notice is appropriate for (a) those creditors to whom no other notice was sent and who are unknown or not reasonably ascertainable by the debtor; (b) known creditors with addresses unknown by the debtor; and (c) creditors with potential claims unknown by the debtor. The Debtor proposes an expansive publication notice program described above and designed to provide notice of the Asserted Asbestos Claims Bar Date to future claimants holding Asserted Asbestos Claims.

If a creditor is required to file a proof of claim but fails to do so by the applicable deadline established by the Court, Bankruptcy Rule 3003(c)(2) provides that such creditor "shall not be treated as a creditor with respect to such claim for the purposes of voting and distribution." Fed. R. Bankr. P. 3003(c)(2). Accordingly, the Debtor requests that any holder of an Asserted Asbestos Claim against the Debtor that is required to file a proof of claim in accordance with an entered order of the Court granting this Motion, but fails to do so on or before the Asserted Asbestos Claim Bar Date, shall (a) be forever barred, estopped, and enjoined from asserting such a claim against the Debtor, their property, or their estates (or submitting a proof of claim with respect thereto) and (b) not be treated as a creditor with respect to such claim for the purposes of voting and distribution with respect to any chapter 11 plan of reorganization that may be filed in this bankruptcy case.

B. A Robust Bar Date Publication Notice Process Can Bind Future Claimants of Asserted Asbestos Claims to the Asserted Asbestos Claim Bar Date.

A robust publication notice process can bind future claimants of Asserted Asbestos Claims to a claims bar date set by the Court. Although confirmation of a Section 524(g) Plan that creates a Section 524(g) Trust is the preferred process for a chapter bankruptcy case with Asserted Asbestos Claims, courts have set binding bar dates for Asserted Asbestos Claims, including for future claimants, where a Section 524(g) Plan is not feasible. *In re Grossman's*,

607 F.3d 114 (3d Cir. 2010)(“a Bankruptcy Code section 524(g) trust created under a chapter 11 plan is required for the treatment of unknown future asbestos-related claims, unless, among other considerations the debtor can show that “it was unreasonable or impossible for the debtor to establish a trust for future claimants a provide by [section] 524(g).”)

Although not a case involving future claimants of Asserted Asbestos Claims, the United States Supreme Court held in case *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652 (1950) that publication notice of a claims bar date is effective to discharge claims held by unknown claimants so long as the publication notice is “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Id.*; see, e.g., *In re Caracciolo*, No. ADV. 05-90348-H11, 2006 WL 6604324, at *4 (Bankr. S.D. Cal. Dec. 13, 2006)(“The standard set forth in *Mullane* is flexible and whether a particular method of notice is reasonably calculated to reach interested parties depends upon the particular circumstances of each case. *Tulsa Professional Collection Serv., Inc. v. Pope*, 485 U.S. 478, 484 (1988)(emphasis added)”).

The United States Court of Appeals for the Fifth Circuit (the “Fifth Circuit”) and United States Court of Appeals for the Third Circuit (the “Third Circuit”)² have held that proper publication notice of a claims bar date can function to bar the claims of unknown future claimants such as unknown asbestos-related injury claimants. *In re Energy Future Holdings*, 949 F.3d 806 (3d Cir. 2020); *In re Placid Oil Co.*, 753 F.3d 151, 157 (5th Cir 2014).

In *Placid Oil*, the Third Circuit held “. . . that because a bar date notice need not inform unknown claimants of the nature of their potential claims, Placid's notices were substantively sufficient to satisfy due process. Placid's notice informed claimants of the existence of the bankruptcy case, the opportunity to file proofs of claim, relevant deadlines, consequences of not filing a proof of claim, and how proofs of claim should be filed. We decline to articulate a new rule that would require more specific notice for unknown, potential asbestos claimants.” *Id.* at 158. Importantly, the Fifth Circuit in *Placid Oil* described the publication notice used and

² There appear to be no applicable cases on this issue from the United States Court of Appeals for the Ninth Circuit (the “Ninth Circuit”) or lower courts in the Ninth Circuit.

1 deemed it sufficient as follows:

2 On three occasions in January 1987, Placid published a Notice of Bar Date in the
3 Wall Street Journal, a newspaper of national circulation available in Louisiana.
4 The notice informed creditors of the existence of the bankruptcy case, their
5 opportunity to file proofs of claim, relevant deadlines, consequences of not filing
6 a proof of claim, and how proofs of claim should be filed.

7 *Placid Oil*, 753 F.2d at 153.

8 In another very large Third Circuit case with over 10,000 known claimants with latent
9 asbestos-related injury claims, which involved an asset sale to a third party buyer, the Third
10 Circuit affirmed the Bankruptcy Court's holding that unknown future creditors' claims were
11 discharged because allowing these claims would result in an increase of the negotiated purchase
12 price for future liability that the buyer did not bargain for pursuant to Bankruptcy Code section
13 363(m). *In re Energy Future Holdings*, 949 F.3d 806 (3d. Cir. 2020). In the opinion, the Third
14 Circuit noted that the debtor had provided extensive publication notice consisting of the
15 engagement of a noticing expert and notice being published "in seven consumer magazines, 226
16 local newspapers, three national newspapers, forty-three Spanish-language newspapers, eleven
17 union publications, and five Internet outlets." *Id.*, at 823. The Third Circuit also noted that the \$2
18 million spent in notice publication produced a "similar result as a 524(g) trust," but warned that a
19 debtor that seeks to bypass a Section 524(g) Trust does so at its own peril. *Id.*

20 In the *In re Overseas Shipping Group, Inc.* case, Case No. 12-200000-MFW, pending in
21 the United States Bankruptcy Court for the District of Delaware, the Bankruptcy Court
22 considered the issue of publication notice substituting for a Section 524(g) Trust when
23 considering the *Motion of Carmelo Susino, on Her Behalf and on Behalf of the Estate of*
24 *Decedent Luciano Susino and All Other Statutory Beneficiaries of Decedent Luciano Susino to*
25 *Allow the Filing of A Late Proof of Claim*, Case No. 12-200000-MFW, (Bankr. D. Del., Oct. 18.
26 2021) (ECF No. 4601) (the "Susino Motion"). In granting the Susino Motion, the Bankruptcy
27 Court found that while a Section 524(g) Trust is not required, publication notice was insufficient
28 in that case as "the publication was once in only three publications and according to the
creditors, not published in any publication that a common laborer or able-bodied seaman, who

1 had served on the debtor's vessels, could honestly be expected to have read. I don't expect
2 seamen read the Financial Times or even industry publications to shipbuilders." *In re Overseas*
3 *Shipholding, LLC*, Case No. 12-20000, Transcript of Court Decision at 52 (Bankr. D. Del., Oct.
4 18, 2021) (ECF No. 4612). A true and correct copy of the Overseas Shipbuilding Transcript of
5 Court Decision is annexed hereto as **Exhibit A** to the Motion. In addition, the Overseas
6 Shipbuilding bar date notice was generic with no reference to asserted asbestos claims. *Id.* In
7 contrast, the Debtor's Proposed Notice Process includes a Bar Date Notice specifically focused
8 on Asserted Asbestos Claims, and proposes multiple publication dates in five (5) publications
9 specifically tailored to reach holders of potential existing and future Asserted Asbestos Claims.

10 Given the Debtor's inability to confirm a Section 524(g) Plan as it lacks insurance
11 coverage or other sources of funding for a Section 524(g) Trust, there is ample authority that
12 supports the Court's fixing of a bar date for future claimants' Asserted Asbestos Claims based on
13 the Debtor's robust Proposed Notice Process, which incorporates broad publication notice
14 tailored in content and distribution scope to reach its particular potential unknown future
15 claimants with Asserted Asbestos Claims.

16 **V. CONCLUSION**

17 For the reasons set forth above, the Debtor respectfully requests that the Court enter an
18 order (i) granting the Motion in its entirety; (ii) approving the Proposed Notice Process,
19 including the Asserted Asbestos Claims Bar Date; and (iii) granting such other and further relief
20 the Court deems just and proper.

21
22 Dated: March 21, 2024

BEN NYE CO., INC.

23
24 By: 

25 EVE H. KARASIK
26 JOHN-PATRICK M FRITZ
27 ROBERT M. CARRASCO
28 LEVENE, NEALE, BENDER, YOO
& GOLUBCHIK L.L.P.
Attorneys for Post-Effective Date Debtor

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT A

***In re Overseas Shipholding, LLC*, Case no. 12-20000, Transcript of Court Decision
at 52 (Bankr. D. Del., Oct. 18, 2021) (ECF No. 4612)**

1 UNITED STATES BANKRUPTCY COURT
2 DISTRICT OF DELAWARE
3 . Chapter 11
4 IN RE: .
5 . Case No. 12-20000 (MFW)
6 OVERSEAS SHIPHOLDING GROUP, .
7 INC, et al., .
8 . Courtroom No. 3
9 . 824 Market Street
10 . Wilmington, Delaware 19801
11 .
12 Reorganized Debtors. . September 28, 2021
13 2:00 P.M.

10 TRANSCRIPT OF TELEPHONIC HEARING
11 BEFORE THE HONORABLE MARY F. WALRATH
12 UNITED STATES BANKRUPTCY JUDGE

12 TELEPHONIC APPEARANCES:

13 For the Reorganized Debtors: Thomas Kessler, Esquire
14 CLEARY GOTTlieb STEEN & HAMILTON LLP
15 One Liberty Plaza
New York, New York 10006

16 For Carmela Susino: Natalie Ramsey, Esquire
17 ROBINSON & COLE LLP
18 1201 N. Market Street, Suite 1406
Wilmington, Delaware 19801

19 Audio Operator: Mandy Bartkowski, ECRO

20
21 Transcription Company: Reliable
22 1007 N. Orange Street
23 Wilmington, Delaware 19801
(302)654-8080
Email: gmatthews@reliable-co.com

24 Proceedings recorded by electronic sound recording,
25 transcript produced by transcription service.

1 MATTER GOING FORWARD:

2 1. Motion of Carmela Susino, on Her Own Behalf and on the
3 Behalf of the Estate of Decedent Luciano Susino and All Other
4 Statutory Beneficiaries of Decedent Luciano Susino to (I)
5 Reopen Chapter 11 Case and (II) Modify the Discharge
Injunction to Pursue Insurance Coverage and Allow the Filing
of a Late Proof of Claim (D.I. 4599, filed 8/19/21)

6 2. Motion of Carmela Susino, on Her Own Behalf and on Behalf
7 of the Estate of Decedent Luciano Susino and All Other
8 Statutory Beneficiaries of Decedent Luciano Susino to Allow
the Filing of a Late Proof of Claim (D.I. 4601, filed
8/19/21)

9 **Ruling: 50**

10

11 EXHIBITS: ID Rec'd

12 Declaration of Damon Mote 4

13

14

15

16

17

18

19

20

21

22

23

24

25

1 (Proceedings commenced at 2:01 p.m.)

2 THE COURT: Good afternoon. This is Judge
3 Walrath. We're here in Overseas Shipholding Company.

4 I will turn it over to counsel for the debtor to
5 introduce what is on the agenda.

6 MR. KESSLER: Good afternoon, Your Honor. Tom
7 Kessler from Cleary Gottlieb on behalf of the reorganized
8 debtor OSG.

9 We're here today on the motions of the Susino's to
10 reopen the Chapter 11 case of Overseas Shipholding Group and
11 to allow the late filing of a proof of claim. Those are
12 reflected as agenda items number 1 and 2 on Your Honor's
13 agenda. And we are also here, of course, on the cross motion
14 of OSG to enforce a confirmation order.

15 Your Honor, given that today's hearing was
16 precipitated by the Susino's motions I will cede the podium
17 to my friend on the other side, but I do want to briefly
18 begin with a bit of housekeeping which is that as Your Honor
19 saw in connection with OSG's opposition and cross motion we
20 filed the declaration by Mr. Damon Mote. Mr. Mote is the
21 vice president and chief administrative officer of OSG and
22 his declaration is at ECF No. 4604-3.

23 I believe that Mr. Mote is on the line this
24 afternoon and is happy to answer questions the court may
25 have. That said, he does have a pressing commitment that he

1 stepped away from in order to attend this afternoon's hearing
2 and so subject to Your Honor's views we would ask that his
3 declaration be moved into evidence and that subject to any
4 questions Your Honor may have that he be excused from the
5 courtroom.

6 THE COURT: Alright, is there any objection to
7 admitting his declaration?

8 MS. RAMSEY: No objection, Your Honor.

9 THE COURT: Alright, Ms. Ramsey, do you wish to
10 cross-examine the declarant?

11 MS. RAMSEY: No, Your Honor.

12 THE COURT: Alright, then he may be excused and it
13 will be admitted.

14 (Declaration of Damon Mote received into evidence)

15 MR. KESSLER: Wonderful. Thank you very much,
16 Your Honor.

17 With that I will happily cede the digital podium
18 to Ms. Ramsey.

19 THE COURT: Alright.

20 MS. RAMSEY: Thank you, Your Honor. For the
21 record Natalie Ramsey of Robinson & Cole appearing on behalf
22 of the estate of Luciano Susino and his beneficiaries.

23 We are here today on our motion to reopen the
24 Overseas Shipholding Group bankruptcy case to permit Mr.
25 Susino's beneficiaries to file a late proof of claim in the

1 case. Mr. Susino did not timely file a proof of claim in
2 response to the bar date which was established as May 31st of
3 2013. Mr. Susino learned that he had mesothelioma and
4 asbestos exposure related cancer on February 28th, 2017. He
5 passed away on March the 5th, 2018. Mr. Susino resided in
6 Sicily.

7 Mr. Susino was an unmanifested asbestos claimant
8 at the time of the OSG bankruptcy case. As an unmanifested
9 asbestos claimant they are sometimes called future claimants,
10 sometimes known as demand holders under Section 524(g),
11 sometimes referred to as latent asbestos claimants. That is
12 someone who has been exposed to asbestos but has not yet
13 contracted an asbestos disease because of a latency
14 associated with asbestos injury.

15 Neither Mr. Susino nor his beneficiaries knew of
16 the OSG bankruptcy. Neither Mr. Susino nor his beneficiaries
17 received notice of the bar date or the plan or
18 reorganization. And we continued that Mr. Susino's claim is
19 not discharged by the OSG bankruptcy and that he should be
20 permitted to file a late proof of claim because he did not
21 receive procedural due process in connection with the bar
22 date as required by (indiscernible) and its progeny. And to
23 the extent that the bar date notice was legally sufficient
24 his failure to file a claim was the result of excusable
25 neglect.

1 OSG takes the position that the bankruptcy court's
2 determination that publication notice was sufficient ends the
3 inquiry; however, the Third Circuit in the Grossman's
4 decision made clear that,

5 "Whether a particular claim has been discharged by
6 a plan of reorganization depends on factors applicable to the
7 particular case and is best determined by the appropriate
8 bankruptcy court or the District Court. In determining
9 whether an asbestos claim has been discharged the court may
10 wish to consider (indiscernible) the circumstances of the
11 initial exposure to asbestos, whether and/or when the
12 claimants were aware of their vulnerability to asbestos,
13 whether the notice of the claims bar date came to their
14 attention, or that the claimants were known or unknown
15 creditors, whether the claimants had a colorable claim at the
16 time of the time of the bar date, and other circumstances
17 specific to the parties including whether it was reasonable
18 or possible for the debtor to establish a trust for future
19 claimants as provided by Section 524(g)."

20 The Grossman's decision was entered on April 27th,
21 2010 over two years before OSG filed its bankruptcy cases on
22 November 14th, 2012. And unlike the Grossman's facts here
23 OSG was aware that it had asbestos liability. It had over
24 7,000 pending claims at the time of its bankruptcy and it was
25 aware that it had asbestos claims based on asbestos exposure

1 occurring on its vessels stemming from alleged exposure for
2 the period 1960's through the 1990's.

3 According to the debtor's disclosure statement at
4 pages 46 to 47 the debtors had been leading owners and
5 operators of ocean going vessels for more than 40 years
6 including during the period that gave rise to thousands of
7 suits by mariners alleging exposure to asbestos while on
8 vessels owned or operated by the debtors and their current
9 and former affiliates.

10 The proofs of claims filed in these Chapter 11
11 cases include more than 7,000 claims alleging exposure to
12 asbestos or other occupational diseases. The asbestos
13 proceedings typically accused debtors and non-debtor OSG
14 defendants and various other defendants of, among other
15 things, negligent maintenance of their vessels, negligence
16 under the Jones Act, and unseaworthiness under general
17 admiralty and maritime law.

18 That background is important to consideration of
19 the facts of what was done and what was not done in the OSG
20 bankruptcy case. First of all, we do not contest that Mr.
21 Susino had an unmanifested asbestos claim at the time of the
22 bankruptcy case. From 1978 through approximately 1980 Mr.
23 Susino worked as a seaman and crew member on board various
24 OSG vessels including the Eastern Line. Mr. Susino alleges
25 that in that capacity he handled, used or was exposed to

1 asbestos and asbestos contained products and equipment
2 without warning or protection which OSG knew was dangerous to
3 his health and could result in development of an asbestos
4 disease.

5 Because his employment predated the OSG bankruptcy
6 he held a claim, although unmanifested, based on that
7 exposure under applicable Third Circuit law. As the court is
8 aware, asbestos disease has a long latency period. In
9 particular mesothelioma has an average latency period of 35
10 to 40 years. Mr. Susino's diagnosis fell squarely within the
11 average latency period for development of mesothelioma.

12 Mr. Susino was also the exact type of claimant
13 that OSG knew existed, a mariner alleging exposure on a
14 vessel operated by OSG during the timeframe that others had
15 made such claims. Mr. Susino's allegations fall squarely
16 within the allegations that individuals had made before and
17 at the time of OSG's bankruptcy.

18 The debtor specifically provided, in their plan,
19 for unimpaired asbestos claims to be reinstated upon the
20 later or the effective date, or the date of allowance of
21 those claims. As the court is aware, an unimpaired claims
22 are claims filed by individuals who have no medical
23 impairment, but have noticed that they may develop and
24 asbestos disease because asbestos fibers have been identified
25 in their lungs.

1 Today, most state courts place those types of
2 claims on an inactive docket unless and until the claimant is
3 diagnosed with an asbestos disease at which point they are
4 then able to proceed with a lawsuit based on seeking
5 compensation for that disease. An unimpaired asbestos claim
6 is a form of present claim. What there is no evidence of in
7 the record of this case is if the debtor did anything to take
8 into consideration unmanifested claims. Claims like those of
9 the plaintiffs in Grossman's.

10 The closest the debtors came to that was in
11 Paragraph 41 of the bar date motion where in discussing
12 publication notice they say such unknown potential claims
13 include, for example, claims of trade vendors who failed to
14 submit an invoice to the debtors, claims of former employees
15 and claims that, for various reasons, are not recorded on the
16 debtors' books and records.

17 Still, there was no effort by the debtor to
18 attempt to reach, other than through this publication notice
19 that we will talk about in a moment with respect to the bar
20 date, prior employees, prior mariners that served on those
21 vessels where the debtor knew it had been subject to asbestos
22 claims and had reason to know it might be subject in the
23 future to claims by those very same types of individuals who
24 would later develop an asbestos disease. There is also no
25 dispute in this case that Mr. Susino was not provided with

1 direct notice of the bar date and that the debtor relies
2 exclusively on publication notice to reach Mr. Susino as part
3 of the group of unknown claimants.

4 The reorganized debtors contend that the bar date
5 -- I'm sorry, that the bankruptcy court's approval of the bar
6 date and publication notice should be controlling, but that
7 is not what Grossman's says and that is not what Energy
8 Future Holdings says. The Third Circuit in Grossman's held
9 that Rule 3003(c)(3) -- I'm sorry, I think I'm quoting now
10 from Energy Future Holdings, not Grossman's. The Third
11 Circuit held in Energy Future Holdings that Rule 3003(c)(3)
12 is capable of affording latent claimants a fair opportunity
13 post-confirmation to seek reinstatement of their claims. And
14 the Third Circuit there said,

15 "It is true, as the plan points out, that they
16 must carry the burden of proof under Rule 3003(c)(3), but
17 that burden for these latent claimants is a light one.
18 Appellants need only file a basic motion reciting the fact
19 that reinstatement of their claims will neither prejudice,"
20 in that case EFH, "nor impact its bankruptcy proceedings and
21 attach a sworn affidavit explaining why they were deprived of
22 due process under Grossman's."

23 We make two arguments in support of seeking to
24 file a late claim:

25 The first is that notice of the bar date was

1 insufficient both in content and in delivery. As we have
2 noted in our papers there was no reference whatsoever in the
3 debtors' notice of bar date to the word "asbestos" let alone
4 any effort to reach individuals that spoke another language,
5 any attempt to reach individuals who had previously served on
6 these vessels, any effort to reach someone who was located
7 out of the country.

8 The content of the bar date is particularly at
9 odds with what the bankruptcy court approved in the Energy
10 Future Holdings case where there was a separate bar date
11 notice, one form that went to manifested claimants another
12 that went to unmanifested claimants, that provided notice to
13 those claimants to the fullest extent possible in multiple
14 languages through multiple efforts which included notices to
15 unions, notices to locations where the various people who
16 might have been exposed to asbestos were located, require
17 direct notice to all individuals that could have been
18 identified as previously having worked at premises that EFH
19 operated that contained asbestos.

20 The content of the notice in the EFH case notified
21 unmanifested claimants of the potential that they might have
22 been exposed to asbestos, that they might develop an asbestos
23 injury in the future, and that, therefore, in order to
24 preserve their right to proceed with a claim they were
25 required to file a claim.

1 If one were to look at the content of the
2 unmanifested bar date notice, which is available on the
3 public docket in the EFH case at Docket Nos. 4985 and 4997,
4 and I guess another notice at 5171 of the EFH case, the court
5 would see that the unmanifested asbestos injury bar date
6 notice goes on for -- or the form itself goes on for several
7 pages explaining to someone what an unmanifested asbestos
8 injury is, notifying them that they may have been exposed,
9 and providing in plain English with respect to the English
10 part of the publication, at least, in plain language that
11 they needed, even if they were not yet experiencing symptoms,
12 to have filed this claim.

13 There is no such content present in what the OSG
14 bar date notice did which was more of a standard, sort of,
15 commercial bar date notice that was not in any way directed
16 content wise to provide notice to individuals that if they
17 had asbestos claims they needed to file those particularly
18 with respect to unmanifested claims.

19 With respect to delivery there was, as we said, an
20 effort only to publish one time in three publications notice
21 of the bar date. One of those publications the debtor notes
22 was a maritime publication, but it is a maritime publication
23 that is not typically read by the seamen, but more of a
24 publication designed for the industry. There has been no
25 allegation, there is nothing in the record to suggest that

1 there was an effort, again, to publish in a language other
2 than English or to reach someone who was a resident outside
3 the country; although, clearly OSG was aware that it had many
4 mariners who worked on its vessels who were not located in
5 the United States.

6 So our first argument is clearly with respect to
7 both content and delivery that the bar date notice did not
8 afford Mr. Susino any type of adequate due process notice of
9 his claims.

10 Our second argument is that if and to the extent
11 that the court were to disagree and find that that that
12 notice was sufficient, which we think is contrary to the
13 Third Circuit even in its discussion in appeals arising out
14 of EFH where the content and the breadth of the notice and
15 the good faith effort to reach all individuals who might have
16 an asbestos claim was critical to its determination of
17 adequacy of the notice in that case. Even if the court were
18 to disagree here and find that under these circumstances the
19 notice was adequate we would contend that nonetheless Mr.
20 Susino should be permitted to file a claim based on excusable
21 neglect.

22 One of the things that the court observed in EFH
23 was -- again, to go back through the issue of notice for one
24 more second, is that there the claimants that appealed had
25 actually admitted that they received publication notice. But

1 despite that admission the court went onto note the
2 extraordinary effort that it believed the debtor there had
3 taken to reach them.

4 With respect to excusable neglect, Your Honor, it
5 is clear that Mr. Susino falls within the criteria that
6 courts have permitted for filing late filed proofs of claim.
7 There are four criteria that are typically applied; prejudice
8 to the debtors, delay was not in the reasonable control of
9 the movement, the length of the delay and the impact on
10 judicial proceedings is considered, and finally good faith of
11 the claimant.

12 Here the United States Supreme Court has found
13 that through Rule 9006 Congress plainly contemplated that
14 courts would be permitted, where appropriate, to accept late
15 filings caused by an advertence in state, carelessness, as
16 well as, and this is the applicable standard here,
17 intervening circumstances. The enlargement of time periods
18 and the ability to accept the filings where there is
19 excusable neglect is part and parcel of bankruptcy process
20 and the ultimate equitable objectives of the balancing of the
21 debtors' need and desire for a fresh start with the
22 fundamental due process rights of the creditors.

23 With respect to the criteria of prejudice to the
24 debtors the courts have instructed that they are to consider
25 several relevant factors including whether the debtor was

1 surprised or caught unaware of the assertion of a claimant
2 had not anticipated;

3 Number two, whether the payment of the claim would
4 force the return of amounts already paid out under the
5 confirmed plan or effect the distribution to creditors;

6 Number three, whether payment of the claim
7 distribution -- payment of the claim would jeopardize the
8 success of the debtors' reorganization;

9 Number four, whether allowance of the claim would
10 adversely impact the debtor actually or legally;

11 Number five, whether allowance of the claim would
12 open the floodgates to other future claims. That is the
13 standard that was articulated in New Century TRS Holdings at
14 465 B.R. 51.

15 With respect to these criteria it is clear that
16 the debtor should not have been surprised or caught unaware.
17 As we said the debtor had great knowledge about its
18 asbestosis liabilities. It was aware of the specific nature
19 of those liabilities, the specific exposures that were
20 alleged. It was even aware that former employees might have
21 claims. So here there certainly cannot be any surprise.

22 With respect to the second criteria of whether
23 payment would force the return of amounts already paid out
24 under the confirmed plan or effect the distribution to other
25 creditors that is also not an issue. Here, the debtor has

1 reinstated and accepted to continue to litigate with asbestos
2 claims or reinstated. Here, if the Susino's claim were to be
3 permitted the Susino's would simply have a right to prosecute
4 their claim against OSG, the reorganized debtors, and the
5 reorganized debtors would have all of the defenses that would
6 ordinarily be available to it in defense of those claims.

7 Number three, whether payment of the claim would
8 jeopardize the success of the debtors' reorganization, there
9 is no question that the debtor here accepted, it made a risk
10 calculation and accepted that there were going to be asbestos
11 claims that would exist post-confirmation. It was aware of
12 524(g). It could have provided for a 524(g) case. It
13 elected not to do that. It made a conscious determination
14 that it was going to deal with the risk of asbestos claimants
15 here so it should not now be heard to complain that payment
16 of the claim would somehow jeopardize part of what it thought
17 it had achieved through its reorganization.

18 The fourth criteria of whether allowance would
19 adversely impact the debtor actually or legally, allowance of
20 the claim would not adversely affect the debtor in any way
21 that any other claim would not. The debtor might have
22 liability on this claim, the debtor might have to defend
23 against this claim, but the primary focus of the debtors
24 pleading really comes to this issue of would it open the
25 floodgates, would it open the floodgates to other future

1 claims.

2 With respect to that criteria, Your Honor, our
3 answer is we have no reason to believe it will. The debtor
4 has said that there have been other claims that they have
5 elected to not prosecute against OSG ultimately, but with
6 respect to where we are now in the cycle of claims that had
7 been manifested you are getting now 35, 40 years from the
8 timeframe when Mr. Susino was on the debtors' vessels. And
9 there is not a floodgates argument. Might there be other
10 people similarly situated there might be. There probably
11 even are other people similarly situated but with respect to
12 those, again, the debtor elected, affirmatively elected to
13 proceed in this fashion with respect to asbestos claims.

14 What we are talking about is simply the potential
15 that it would have to defend against those claims. The
16 debtor counts its success in connection with prior asbestos
17 litigation based upon claims. So other than the potential of
18 defending against those claims the debtor really has not
19 identified a potential of significant harm.

20 Turning to the criteria of delay not being in
21 reasonable control of the movant; obviously, this is a
22 criteria here that is easily satisfied.

23 The movant did not know, could not have known that
24 he had an asbestos disease until it was manifest. It was
25 manifested in 2017. That was well after the bar date, well

1 after the case had concluded, but this is a different type of
2 delay also then you experience in other types of creditor
3 situations. That is why there is a 524(g) that is why there
4 is a whole area of jurisprudence devoted to asbestos
5 bankruptcies because in asbestos circumstances there are
6 latent injuries and they are outside of the reasonable
7 control of anyone. They certainly were not anything that the
8 movant would have wanted, but he was manifested when he was
9 manifested and after that he has pursued his legal rights
10 within the appropriate timeframes.

11 With respect to the criteria of length of delay
12 and impact on the judicial proceedings the criteria there
13 really comes down to was there reasonable reliance by the
14 debtor that it would never have to face these types of
15 claims. Our response to that is there shouldn't be, no
16 reasonable reliance. In fact, we know that the debtor
17 anticipated that there would be some of these claims.

18 In terms of the debtors reliance on what it did,
19 knowing what it knew at teh time, there should be no
20 reasonable reliance that there would not be unmanifested
21 claims out there that were not properly noticed, actually
22 noticed, not given an adequate opportunity to be noticed by
23 the very limited publication notice and the very limited type
24 of information contained on the bar date.

25 Finally, Your Honor, with respect to good faith

1 there is no question that there was no gamesmanship here.
2 The Susino's moved as promptly as reasonably they could being
3 folks from out of the country to prosecute their rights and
4 to come before the court asking the court through appropriate
5 legal channels to provide them with the opportunity to file a
6 late claim so that they could prosecute their action against
7 the OSG entities.

8 At the end of the day, Your Honor, as the Supreme
9 Court has noted in Pioneer, this is really a determination at
10 bottom that is an equitable one. These decisions in this
11 area typically come down to a balancing between the fresh
12 start and the due process and harm to the movant. Here you
13 have a unique circumstance. This is not Grossman's, this is
14 not a circumstance where the debtor was surprised after its
15 bankruptcy that there was an asbestos claim and is relying on
16 publication notice.

17 You had a debtor who knew that Grossman's was out
18 there, knew that there were asbestos claims, knew that it had
19 an option of choosing to have a 524(g) kind of plan and to
20 put together a pool of money that would be available for
21 future claimants. They elected to take a risk that it would
22 handle those claims as they came forward and did not take
23 appropriate steps through a bar date to notify claimants that
24 they should file.

25 On the other hand you have an individual who was

1 exposed to asbestos who is now deceased, whose estate is
2 looking merely for the opportunity to prosecute that claim
3 and leave it to the appropriate trial court as to whether
4 that claim is properly held to be the responsibility of the
5 reorganized OSG entities.

6 Unless the court has questions I will cede the
7 podium.

8 THE COURT: Alright, thank you. I have no
9 questions.

10 MR. KESSLER: Good afternoon, Your Honor. Just
11 for the record, again, Tom Kessler from Cleary Gottlieb on
12 behalf of OSG.

13 Your Honor, I thought given the amount of time
14 it's been since we were all together a bit of background
15 might be helpful. As Ms. Ramsey noted, the Chapter 11 cases
16 were filed nearly nine years ago in November of 2012. In
17 April of 2013 the late Judge Walrath -- oh my goodness, late
18 Judge Walsh.

19 THE COURT: Thank you.

20 (Laughter)

21 MR. KESSLER: I apologize. That bar date order
22 established May 31st, 2013 as the general bar date and it
23 provided it, as Ms. Ramsey noted, with a failure to file a
24 proof of claim by that date would result in potential
25 claimants being forever barred and estopped from asserting

1 those claims against the debtors.

2 The bar date order also approved the sufficiency
3 of the debtors' publication notice which involved publishing
4 the bar date in three publications; the Financial Times, in
5 International Financial Newspaper, the Tampa Bay Times a
6 newspaper widely read and distributed where the debtors had a
7 center of US operations, and Trade Winds a leading shipping
8 industry publication.

9 As Ms. Ramsey noted, by the general bar date more
10 then 7,000 (indiscernible) asserting asbestos related
11 liability were filed. None of those claims were filed in
12 respect of the Susino's alleged liability. Through the
13 Chapter 11 cases the debtors were able to expunge more than
14 6,600 of those claims and it was due to that significant
15 winnowing and in reliance on the bar date order, and
16 discharge injunction (indiscernible) --

17 THE COURT: Sorry, you froze.

18 MR. KESSLER: -- the debtors determined the
19 establishment of a Section 524(g) trust is not necessary. I
20 apologize I will go back.

21 As I mentioned, Your Honor, the debtors were able
22 to expunge more than 6,600 of the 7,000 claims that were
23 filed in respect to asbestos related liability and it was the
24 result of that significant winnowing that the debtors
25 determined in conjunction with the bar date order and with

1 the discharge injunction that would be later embodied in the
2 confirmation order that it was not necessary to establish a
3 Section 524(g) trust.

4 I will return back to this in a moment, but I
5 think one of the themes in the Susino's presentation this
6 afternoon has really been that the debtors are faced with a
7 choice of either accepting unlimited liability for future
8 claims or establishing a Section 524(g) trust. Effectively,
9 it's a mandatory feature of any case where there is asserted
10 asbestos liability. That is simply not the law. And, again,
11 the debtors here, as in many cases, are entitled to rely on
12 the sufficiency and enforceability of the bar date order and
13 the confirmation order.

14 The debtors proposed their plan in March of 2014
15 and in reliance on the plan and disclosure statement and the
16 information that they contained the solicited impaired
17 classes voted overwhelmingly in favor of the plan. As a
18 result, on July 18th, 2014 Judge Walsh entered the
19 confirmation order.

20 As Your Honor knows, the plan and confirmation
21 order mandate that as of the effective date the debtors are
22 discharged and released to the full extent of the bankruptcy
23 code from any and all claims, and any persons or entities are
24 precluded from and enjoined of asserting any liability that
25 resulted or occurred prior to the effective date.

1 The plan went effective in August of 2014 and the
2 final Chapter 11 case was closed February 10th, 2017. As
3 relevant to this afternoon's motions since the entry of the
4 confirmation order Your Honor has enforced the confirmation
5 order and the bar date order as it relates to a tort claimant
6 who sought to assert claims after the general bar date.

7 Turning then to the Susino action --

8 THE COURT: Let's go back to the -- I think you
9 are referring to the Lammer [ph] claim motion?

10 MR. KESSLER: Yes, Your Honor.

11 THE COURT: But I just want to note for the record
12 that was after filing of a certificate of no objection.

13 MR. KESSLER: That is certainly right, Your Honor.
14 The Lammer's did not object to our relief; although, again, I
15 think there has been -- the Lammer objection and the
16 (indiscernible) and I think speaks to the debtors' reliance
17 on the enforceability of the publication notice and having it
18 apply to prevent claims coming years after the closing of the
19 Chapter 11 cases. Here, you know, even several years after
20 the Lammer's objection.

21 So turning back to the Susino action, as Your
22 Honor knows the Susino's filed their lawsuit in the Superior
23 Court of the Virgin Islands in Marcy 2021. I think its
24 noteworthy here we're talking about the claims asserted
25 against OSG, but the Susino's assert that the claims against

1 a significant number of defendants, including many large
2 corporations you typically see in these sorts of asbestos
3 actions, prior to the Susino's filing the relief that they
4 sought from Your Honor there was a series of correspondence
5 between us and the Susino's Virgin Island counsel where we
6 advised them that the Susino action was filed in violation of
7 the bar date order of the plan and confirmation order.

8 The final letter that we sent to them was on May
9 5th. We received no response to that letter. It was not
10 until the filing of this motion that there was further
11 substantive prosecution of the claims from the Susino's. In
12 the meantime, on July 13th I should note, OSG did file a
13 motion to dismiss the Susino action on the basis of the bar
14 date, the plan, and the confirmation order in the Virgin
15 Islands. That motion remains pending.

16 (Indiscernible), Your Honor, the Susino motions
17 argue that principally that Mr. Susino, an admitted unknown
18 creditor, was not provided constitutionally adequate notice
19 of the bar date. Even if he was he should, therefore,
20 somehow be permitted to file a claim more than eight years
21 after the bar date plan. This claim fails for multiple
22 reasons.

23 First, as an initial matter a fundamental
24 assumption that (indiscernible) the argument you heard from
25 Ms. Ramsey this morning is that Mr. Susino, an Italian

1 citizen living abroad at the time of the bar date order, has
2 due process rights under the United States Constitution. The
3 Supreme Court has been unequivocal for more than 70 years
4 that absent limited circumstances not present here foreign
5 citizens do not enjoy due process rights. That has been --

6 THE COURT: Are you suggesting -- sitting in a
7 court that has large international cases are you seriously
8 suggesting that in a bankruptcy case in which you are
9 presumably seeking extra territorial enforcement of my orders
10 that creditors that don't reside in the US are not entitled
11 to appropriate notice of those orders and not entitled to due
12 process rights however they are framed?

13 MR. KESSLER: Your Honor, I am merely suggesting
14 that there have been courts in the claim context that have
15 held that foreign claimants are not entitled to due process.
16 That was in the Fourth Circuit in the Vancouver case.

17 THE COURT: In 1987, is that right?

18 MR. KESSLER: That's right.

19 It was also examined, again, in the General Motors
20 case by Judge Gerber, who also had determined that while
21 there was significant weight to that argument, he didn't need
22 to reach the issue and I think, fortunately, Your Honor, we
23 don't need to reach the constitutional issue here, either,
24 I'm sure as my constitutional law professor will be pleased
25 to hear, because at the end of the day, the adequacy of our

1 notice cannot be reasonably questioned.

2 I'll start with what I understand from this
3 afternoon's discussion are some uncontested facts. First,
4 that Susino's asserted claims are pre-petition claims under
5 the Third Circuit's decision in Grossman's. Mr. Susino
6 allegedly served on an OSG owned or operated vessel between
7 1978 and 1980, and he alleges that it was during that service
8 that he was exposed to asbestos.

9 Second, I think there's no dispute that Mr. Susino
10 was an unknown claimant. As identified in the opposition,
11 OSG undertook significant efforts to identify all potential
12 creditors and claimants as part of its noticing efforts.
13 That effort did not result in the identification of
14 Mr. Susino and as set forth in the Moat (phonetic)
15 declaration, even in response to the filing of the Susino
16 action, OSG was unable to locate any sea-service records for
17 Mr. Susino.

18 As a result, I think there's no question that
19 Mr. Susino was not entitled to actual notice of the bar date,
20 but, rather, that publication notice like that employed by
21 OSG, is sufficient to satisfy the notice requirements for
22 unknown creditors.

23 Turning now to the distribution of the publication
24 notice, courts have long held that debtors are not expected
25 to publish a publication notice that every possible unknown

1 creditor may read and courts, as a result, routinely approve
2 publication notice via national newspapers. As I mentioned,
3 the debtors here published a bar date notice in three leading
4 publications: the *Tampa Bay Times*, which was circulated at
5 the debtor's U.S. base of operations in 2013; the *Financial*
6 *Times*, a globally distributed publication, whose 2013
7 circulation exceeded 650,000; and *TradeWinds*, a leading trade
8 publication which bills itself as the global shipping
9 resource.

10 Again, this publication notice plan was
11 specifically considered and approved by Judge Walsh. I'll
12 note that that decision postdates Grossman's and so,
13 certainly, Judge Walsh was aware of Grossman's and aware of
14 the issues around the sufficiency of publication notice.

15 I think it's important to note that the fact of a
16 specific unknown creditor who may not have subscribed to the
17 *Tampa Bay Times*, the *Financial Times*, or *TradeWinds*, is not a
18 basis on which the publication notice can reasonably be
19 questioned. And, you know, notably, although, in the motion
20 to Susino's claims that none of these publications, all of
21 which I'll note have digital editions, would have reached a
22 manual laborer at sea, they don't identify what publication
23 would have been better, or for that matter, that Mr. Susino
24 was, in fact, at sea in April 2013.

25 And I think the same is true to the suggestion

1 that the debtor should have caused the publication notice to
2 be published in Italian. There's simply no basis to suggest
3 that the debtors had an obligation to publish their notice in
4 every conceivable language spoken by individuals who served
5 on OSG-related ships over the last 40 years, and I submit
6 that it wouldn't have been reasonable to do so.

7 Importantly, here, I'll say as well, a couple
8 times this afternoon Ms. Ramsey had suggested that OSG did
9 not make efforts to identify claimants and I think that's
10 simply wrong. First, as I noted, and is detailed in the
11 pleadings in the primary Chapter 11 cases, the debtors
12 undertook significant efforts to identify all potential
13 creditors and claimants, including former employees, and not
14 only engaged in a series or a (indiscernible) actual notice,
15 via mail, the (indiscernible) filings for all potential
16 creditors they were able to specifically identify, but also,
17 again, specifically undertook publication notice in
18 international publications, in shipping trade publications,
19 in particular, to attempt to identify additional potential
20 claimants.

21 And that system, as we know, and as I mentioned a
22 bit earlier, it worked. Seven thousand asbestos claimants
23 filed proofs of claim. They were sufficiently put on notice
24 to assert those claims in a timely way, and they were able to
25 do that via the notice plan that was proposed, prosecute, and

1 confirmed by Judge Walsh.

2 Now, the Susinos rely heavily on the publication
3 notice effectuated in the 2019 EFH bankruptcy, but as set out
4 in our objection and in the cross-motion, EFH did not set a
5 floor for the constitutionality of sufficient notice and, in
6 fact, it's worth noting that in EFH, the ultimate notice plan
7 was the result of heavily litigated objection and a series of
8 contested matters regarding the publication notice; the
9 prosecutor, I should note, by Ms. Ramsey, herself. And so,
10 it's simply not a comparison to say that because in that
11 case, where unmanifested asbestos claimants were represented
12 by counsel, latent asbestos claimants were represented by
13 counsel, and came in and made specific objections to the
14 notice plan, which were resolved through the modification of
15 the debtor's initial plan, that simply isn't the case here;
16 of course, despite the fact that there were 7,000 asbestos
17 claims filed and a number of prominent asbestos counsel who
18 appeared in the case and prosecuted objections to the case,
19 there was no objection to the publication notice at the time
20 that it was filed or considered by the Bankruptcy Court.

21 And, again, I'll note that, you know, although
22 there are certain examples of extraordinarily robust
23 publication notices like in EFH, bankruptcy courts
24 consistently approve and enforce publication notices that
25 fully align with the debtor's notices here. And just as a

1 few examples, OSG's notice was as or more fulsome than in
2 Your Honor's cases of Swift Energy and (indiscernible)
3 offshore and Sears and (indiscernible), only to name a few.

4 Turning now to the sufficiency of the content of
5 the notice, again, it's practically impossible for a debtor
6 to identify every conceivable basis for unknown liability and
7 that's why courts require only that a bar date notice set out
8 a bar date, explain the procedure for following -- to file a
9 proof of claim, and the consequence of not filing a proof of
10 claim by the bar date. And the publication notice here
11 plainly contains all of that information.

12 Now, the other point I think that's important to
13 note is that there a -- we've heard a lot about the fact that
14 the publication notice doesn't mention the word "asbestos."
15 There's no proposition of law that requires the debtors to
16 single out a specific class of potential unknown creditors in
17 order for the publication notice, which has been affirmed by
18 this Court, to have binding effect. And that's particularly
19 true, again, in light of the fact that there were a
20 significant number of asbestos claimants who, after the
21 publication notice and after the filing of the bar date
22 order, came forward in (indiscernible) to assert their claims
23 in a timely way.

24 I'd like to turn briefly to the argument of
25 excusable neglect. I think the Susinos implicitly concede

1 that the bar date notice, as drafted, bars the asserted
2 claims and so they couldn't have just (indiscernible)
3 permission to file a late-filed claim some eight years after
4 the general bar date.

5 You know, I think that there are several factors
6 that are discussed. I think the two here that are the most
7 critical are the prejudice that's suffered by OSG and the
8 length of the delay. Here, the prejudice that would be
9 suffered by OSG is twofold. First, just taking the
10 (indiscernible) of the claim, it's difficult to estimate the
11 amount of damages that could result from an adverse,
12 (indiscernible) in the Susino action, where the causes of
13 action include loss of consortium, survival claims, punitive
14 damage claims, all in unliquidated amounts.

15 But second, and more importantly, allowing claims
16 like the Susinos to proceed would fundamentally undermine the
17 discharge injunction itself, which is a key feature relied
18 upon by the creditors and equity holders in confirming the
19 plan. As set out in the Moat declaration, as referenced by
20 Ms. Ramsey this afternoon, dozens of actions have been filed
21 or threatened by would-be personal injury claimants,
22 asserting pre-petition asbestos or other toxic chemicals,
23 exposure to toxic chemicals, and each of them has been
24 successfully addressed by pointing their counsel to the
25 binding provisions of the bar date order, the plan, and the

1 confirmation order.

2 And allowing the Susinos to file proofs of claim
3 with respect to that pre-petition liability could effectively
4 open the floodgates to an untold number of similar requests.
5 Now, I think those harms are only magnified by the fact that
6 the reorganized debtors have not reserved for those claims.

7 (Audio interference) --

8 THE COURT: You're frozen again.

9 MR. KESSLER: -- reflects the conscious decision
10 to accept -- I apologize.

11 The problem that we're discussing I think would
12 only be magnified by the fact that there is no reservation or
13 reserve set out for these claims and the Susinos tried to
14 turn that to their advantage by claiming that it reflects a
15 conscious decision to accept unlimited liability in respect
16 to potential future claims, but that's exactly backward.

17 The debtor's decision not to implement a
18 Section 524(g) trust, of course, is not mandatory under the
19 Bankruptcy Code. It reflects their reliance on the strength
20 and enforceability of the bar date order, the confirmation
21 order, and the plan. And their comfort, in reliance on those
22 orders, by the time of confirmation, they had fully
23 quantified the scope of liability that would survive the
24 confirmation order, as opposed to liability that would be
25 fully barred and discharged and would not attack the

1 reorganized debtors. I think the boilerplate disclosures in
2 the disclosure statement that are recognized, that a
3 theoretical possibility of a challenge to the discharge
4 injunction are really not to the contrary, but are, instead,
5 the kinds of anodyne disclosures that you see in all large
6 Chapter 11 cases.

7 Importantly, the harms that I'm discussing are not
8 only going to impact the reorganized debtors, but, of course,
9 the creditors and equity holders who invested billions of
10 dollars into the plan and into the reorganized debtors, in
11 reliance on the plan and confirmation order.

12 I'd also submit that the Susinos' delay here is
13 not exceedingly full. It comes more than eight years after
14 the general bar date and courts have consistently found that
15 delays of even a year are simply too long and you can see
16 that in the cases we site at paragraph 50 of our opposition
17 and cross-motion.

18 Now, I appreciate that Mr. Susino was diagnosed
19 after the confirmation order and that his death occurred in
20 2018, but I don't believe that that overcomes the nature of
21 the delay, given that, number one, the asserted claims
22 admittedly arose well before his death and, number two, the
23 Susinos provide no explanation for their decision to wait
24 more than three years after Mr. Susino's death to seek relief
25 from this Court.

1 The Susinos separately claim that the Chapter 11
2 cases should be reopened to allow them to pursue insurance
3 coverage. As we mentioned in the opposition, Your Honor,
4 even if the debtors were able to confirm coverage for the
5 asserted claims, which they have not been able to do, the
6 debtors don't have typical insurance; rather, they
7 participate in something called P&I club, which operate on a
8 strict "pay to be paid" basis. And that first would require
9 a judgment against OSG or some settlement that P&I club would
10 approve.

11 And I would also note that, that point, in terms
12 of the insurance coverage, is undisputed, based on my read of
13 the reply, so there really is no basis to reopen the case for
14 some separate purpose, to try to pursue non-existent
15 insurance coverage.

16 Your Honor, I very briefly now will just turn to
17 the cross-motion. As we've been discussing, the confirmation
18 order and plan squarely preclude the asserted claims from
19 being asserted against OSG and this Court has to reserve the
20 authority to enforce the confirmation order.

21 For their part, I think the Susinos implicitly
22 concede that they have violated the confirmation order by
23 seeking to file a late-filed claim months after filing suit
24 against OSG, by asserting claims that are predicated on the
25 very pre-petition liability they failed to timely assert in

1 the Chapter 11 cases. Given the clear violations of the
2 confirmation order, we would request that the Court issue an
3 order directing the Susinos to dismiss the Susino action with
4 prejudice.

5 And, finally, Your Honor, to the extent that the
6 Court believes there is some remaining nuance or further
7 factual or legal determination that needs to be made in
8 respect of the asserted claims, we submit that the interests
9 of judicial economy are best served by exercising permissive
10 abstention in favor of the pending Susino action in the
11 Virgin Islands where, as we've discussed, OSG has sought
12 dismissal of the plan on the basis of the confirmation order.

13 We addressed the relevant factors in our brief and
14 I won't retread them unless Your Honor has any particular
15 questions, but I'll note that we think that it's clear that
16 the Virgin Islands Court has the ability to determine the
17 dispute and that's particularly true in the event that the
18 (audio interference) issues are not outcome determinative,
19 which we believe they should be, but in the event that
20 they're not, there may be any number of issues that relate to
21 substance (audio interference) asbestos law (audio
22 interference) as well as (inaudible) due to the sheer number
23 of (audio interference) in that action.

24 (Audio interference) other issues Your Honor may
25 address I'll, again, cede the podium to Ms. Ramsey.

1 THE COURT: No, thank you.

2 Ms. Ramsey?

3 MS. RAMSEY: Thank you, Your Honor.

4 I'd like to start with sort of the unique nature
5 of unmanifested asbestos claimants, and that's what we're
6 talking about here, and I think that is what OSG's argument
7 in this is. Unmanifested claimants are people who don't know
8 they have claims, by definition.

9 And what happened here, with respect to provision
10 of notice to asbestos claims and the asbestos claims filed is
11 you had present asbestos claimants who filed. There's
12 nothing in the record whatsoever that suggests that any
13 unmanifested asbestos claimant responded to the bar date
14 notice and that makes a lot of sense why they wouldn't have.
15 How could they have known that their claim was intended to be
16 barred? How could they know that they would develop an
17 injury, based upon the content of the notice here?

18 Just to review a little bit -- and this comes from
19 the debtor's disclosure statement, again, referencing
20 pages 46 and 47 -- there's a discussion about the debtor's,
21 the 7,000 claims that were filed in response to the bar date.
22 And the debtors said, as follows:

23 "The vast majority of the proceedings to which
24 asbestos claims relate were initiated between 1986 and 2000
25 in the United States District Court for the Northern District

1 of Ohio and subsequently transferred to the United States
2 District Court for the Eastern District of Pennsylvania,
3 where they have been consolidated into multi-jurisdictional
4 litigation."

5 And I'm skipping some of the words here to
6 simplify.

7 "The asbestos proceedings," and they go on,
8 "typically accuse the debtors and nondebtor OSG Defendants,
9 of, among other things, negligent maintenance of their
10 vehicles, negligence under the (indiscernible) Act and
11 unseaworthiness under the general admiralty and maritime law.
12 The asbestos proceedings typically demanded damages in an
13 unliquidated amount on account of loss of earnings, pain and
14 suffering, and an array of other costs, in addition to
15 punitive damages. They allege injuries stemming from alleged
16 exposure in the 1960s through the 1990s. The vast majority
17 of asbestos claims relate to asbestos proceedings that were
18 dismissed by the multidistrict litigation court, prior to the
19 petition date."

20 And then they go on to talk about an agreement
21 that they reached, subsequently, with the lawyer who
22 apparently represented the vast majority of those 7,000
23 claimants; something like 6300 of them. And so, what you're
24 talking about is current claimants who responded to a bar
25 date order that they probably received direct notice of,

1 because they were in litigation with the debtor at the time.

2 Also, I wanted to return to the debtor's effort to
3 make sure that direct notice went to a whole bunch of people.
4 And it's clear that if you trace through the bar date motion,
5 what the bar date motion that was approved by the bar date
6 order says is that the debtors were looking to provide direct
7 notice to all current and former employees of the debtors
8 that left the employ of the debtors on or after the petition
9 date.

10 So, there was no effort, in the first instance
11 here, to get any notice to any former employees who were no
12 longer employed as of the petition date, which is how, then,
13 when the bar date motion traces further down, it comes to be
14 that a number of potential claims are specifically defined as
15 including claims of former employees. So, here, really, what
16 you have was a very, very limited notice to the employees.

17 With respect to the specific unique nature of
18 contingent claims, the Third Circuit in EFH, went through
19 quite a long discussion about the fact that it is precisely
20 the latency and the length of time between injury or between
21 exposure and manifestation that had caused the Court in the
22 Combustion Engineering case to talk extensively about the
23 requirements to bind future claimants in that case.

24 And the Court went on to say that with respect to
25 the bar date in the EFH case -- and I'm going to read some of

1 what the Third Circuit said, because it's directly responsive
2 to the argument that you just heard:

3 "First, all latent claimants will have the
4 opportunity to show that reinstatement would pose no danger
5 of prejudice to the debtors here."

6 As we've explained, the prospect of a post-
7 confirmation procedure (indiscernible) for reinstatement, in
8 that case, was baked into the procedure. Here, what you have
9 is really a complete disregard of the potential of
10 unmanifested claims. Second, latent claimants will have the
11 opportunity to demonstrate a reason for the delay by showing
12 that they would otherwise be deprived of due process under
13 Grossman's.

14 As we made clear in that case, a latent claim
15 cannot be constitutionally discharged if the claimant
16 received inadequate notice of the claims bar date, a concern
17 that arises starkly in the situation presented by persons
18 with asbestos injuries that are not manifested until years or
19 even decades after exposure, citing to Grossman's.

20 "Because persons in the exposure-only category may
21 not even know of their exposure, may not realize the extent
22 of the harm they may incur, or even if they fully appreciate
23 the significance of the notice they did receive, without
24 current afflictions, may not have the information or
25 foresight needed to decide intelligently whether to file a

1 claim," citing to Amchem.

2 For that reason, we identified in Grossman's,
3 factors bearing on the adequacy of the notice of the claims
4 bar date, including with particular relevant for the
5 Rule 3003(c)(3) proceedings we consider today, whether the
6 notice of the claims bar date came to the claimants'
7 attention, whether and/or when the claimants were aware of
8 their vulnerability to asbestos, and whether the claimants
9 had a colorable claim at the time of the bar date, thus,
10 latent claimants will have a chance to argue, based on these
11 factors, that the permanent discharge of their respective
12 claims would not comply with due process under Grossman's;
13 undoubtedly, an adequate reason for the delay and obtaining
14 restatement under Rule 3003(c)(3).

15 Finally, while the length of the delay between the
16 bar date and latent claimants' Rule 3003(c)(3) motions will
17 be substantial, latent claimants will not be precluded from
18 arguing the delay, have no impact on the bankruptcy
19 proceedings, because those proceedings concluded with a
20 confirmation order. So, this factor, too, cuts in favor of
21 granting their 3003(c)(3) motions.

22 In sum, our excursion through the Rule 3003(c)(3)
23 factors convinces us that the rule the capable of providing
24 latent claimants with a fair opportunity to seek
25 reinstatement. It allows them to argue that their late

1 bounds would impose no prejudice on their EFH, here, OSG, and
2 that the length of their delay would not affect any
3 bankruptcy proceeding. It, likewise, allows them to argue
4 that without reinstatement, they would not be afforded due
5 process under Grossman's.

6 That is exactly the situation we have here. There
7 can be no delay or significant delay or undue delay by an
8 individual who could not possibly have responded to the bar
9 date because they were unmanifested and once manifested,
10 then, came into this court. As the Court is aware, there has
11 been an ongoing dialogue back and forth where the debtor was
12 proposing or suggesting or encouraging that these claimants
13 withdraw and these claimants were asking the debtor to agree
14 that based on the lack of adequate due process here, that
15 they be permitted to proceed, and, ultimately, unable to
16 resolve that between themselves, this motion was filed.

17 So, I just want to conclude with the end of the
18 EFH decision, because it's entirely consistent with what
19 happened here. You have a very sophisticated debtor with
20 very sophisticated other parties who have been involved in
21 this case, all of them understanding the prospect that there
22 were asbestos claims out there. None of them doing anything
23 to protect the interests of the unmanifested claimants and
24 electing that they would move forward without seeking to take
25 advantage of the various potential ways that they could have

1 tried to deal with those liabilities, either through a 524(g)
2 trust or through a robust bar date process that was designed
3 to provide them with the greatest opportunity to argue that
4 they had done all they could under the circumstances to
5 provide due process notice to these claimants.

6 The Third Circuit at the end of the EFH case
7 stated:

8 "Though we decline to upset the approach taken
9 here, we share the Bankruptcy Court's regret that the debtors
10 asked for a bar date in the first place both, because the bar
11 date might adversely affect claimants who have manifested
12 injury or will manifest injured, based on pre-petition
13 exposure, who have not filed proofs of claim and because it
14 led to a lot of litigation and a lot of expense and a two-
15 million-dollar noticing (indiscernible). Indeed, this case
16 serves as a cautionary tale for debtors attempting to
17 circumvent 524(g).

18 The alternative route EFH has chosen for
19 addressing its asbestos liability has produced a similar
20 result as a 524(g) trust: reimbursement for latent claimants
21 who either filed proofs of claim or did not receive notice of
22 a bar date, but with added and unnecessary back-end
23 litigation."

24 So, that is what we have here. OSG has had to
25 understand that in every asbestos trust, you have trusts that

1 go on for 40, 50, 60 years to account for the latency; that
2 is a feature of asbestos litigation. Being a Defendant in
3 asbestos litigation, OSG knew or should have shown that that
4 was a risk that they were undertaking here. They did not
5 address it.

6 And to conclude with the Third Circuit's words, we
7 are not charged with ensuring that EFH's strategic choices
8 were optimal or even advisable; we are merely asked to ensure
9 that they satisfied the Bankruptcy Code and the Constitution.
10 And because the Third Circuit concludes that there is an
11 opportunity for unmanifested claimants to come back in and
12 raise the precise kinds of circumstances that we have here,
13 the Court concluded that their due process considerations
14 were satisfied with the exception or with the caveat that an
15 important part of that was the express determination that
16 latent claimants could come back and make a colorable claim
17 that they did not receive notice.

18 And that was in the context of the EFH case,
19 where, if the Court were to take a look at Docket 4985 at
20 pages 8 and 9, there is a detailed description of what the
21 notice was in the EFH case for unmanifested claimants, which
22 included a cover letter, a publication notice, an asbestos
23 bar date notice, a claim form mailed via First-Class Mail, to
24 the known holders of asbestos claims currently pending, as
25 well as known asbestos claimants counsel with respect to

1 those claims, also, to individuals identified as current and
2 past employees and contractors of the debtors and their
3 predecessors, who may have been exposed to asbestos.

4 In addition to all of that direct notice, there
5 were consumer publications appearing in *AARP*, *American*
6 *Legion*, *National Geographic*, *Parade*, *People*, *Reader's Digest*,
7 and *VFW*. There was 226 local newspapers covering geographies
8 around the plants relating to EFH. There were national
9 publications in *The New York Times*, *USA TODAY*, and *The Wall*
10 *Street Journal*. There were 43 local Spanish-language
11 newspapers covering areas near where EFH operated plants.
12 There were 11 union, labor publications, in which the notice
13 was published. There was online media, featuring banner
14 advertisements on AARP.com, (indiscernible) network,
15 Facebook, MSN, Yahoo, (indiscernible) network, all nationally
16 displayed. There was an informational release, a party-
17 neutral, court-approved, informational release distributed to
18 approximately 4,200 print, broadcast, and 5,500 online press
19 outlets throughout the United States. There were sponsored
20 search listings. There was a website, separate from the
21 Chapter 11 case that contained neutral information that was
22 designed to be easily understood. And there was message
23 content focus, which was intended to provide, in the words of
24 the notice, a clear, concise, plain-language text.

25 All of those features were present in EFH and

1 still, the Third Circuit, in evaluating the appeal from that,
2 recognized the rights of unknown claimants in the context of
3 all of that. And this was just national; there was no
4 international aspect to the EFH asbestos liability. This was
5 all done and still the Third Circuit noted the importance of
6 the right of latent claimants to come back and say, despite
7 all of that, it was still not effective to me.

8 Here, we have a fraction -- not even a fraction --
9 we have practically no notice, no content, no delivery, no
10 effort at other languages, no effort to reach former
11 employees. So, it is absolutely necessary, under binding
12 Third Circuit precedent for the Court to have the opportunity
13 to consider these issues in the context of latent claimants
14 and assess whether here, like in EFH, the debtor made a
15 decision which it may end up now regretting, but it made a
16 decision to not pay attention, not to take care of, not to
17 attempt in good faith, to bind the unmanifested claimants
18 during this bankruptcy.

19 THE COURT: All right. Thank you.

20 Anything more, Mr. Kessler?

21 MR. KESSLER: Your Honor, just three points, very
22 briefly. First, I would note -- and I will admit that my
23 recollection of this is a bit hazy, but I spent a lot of my
24 junior years dealing with the asbestos claims in OSG -- a
25 significant number of them were asserted by claimants who had

1 what we'll refer to as unmanifested injuries. There are
2 omnibus proofs of claim filed by Mr. Kellerman, who I
3 remember quite well. They had their claims removed from the
4 underlying mardock (phonetic), because they had simply not
5 generated a cognizable injury under applicable law and yet,
6 they, nonetheless, were able to file claims in the
7 bankruptcy. There were many thousands of them.

8 I think it's just simply not accurate to say that
9 there was no effort or ability for former employees who
10 believed that they had been exposed to asbestos, to assert
11 their claims.

12 The second, briefly on noticing efforts, I think
13 the distinction between employees and former employees is
14 really irrelevant here, where, even in response to its
15 specific request to identify records for this specific
16 employee, we've been unable to identify any record of
17 Mr. Susino's sea service. And so, even if there had been an
18 exacting process through which every former employee that the
19 OSG debtors had records of, had been notified, it did not
20 include Mr. Susino.

21 Third, just to end on EFH as Ms. Ramsey did, a
22 couple of points. First, no one is disputing that there is a
23 process by which claimants can make a claim that they should
24 be excused from the in-court bar date order. No one is
25 disputing that. No one is claiming that there is no ability

1 to seek some recompense of the Court. And EFH, again, talks
2 in this sort of permissive language about the ability of
3 people to make attempts.

4 Again, to the extent that EFH is intended to serve
5 as a cautionary tale, and I appreciate that the asbestos
6 counsel in that case was able to obtain one of the most
7 comprehensive, elaborate notice provisions, publication
8 notice provisions that I've ever seen, that simply isn't the
9 standard and, in any event, it was some number of years after
10 OSG, in fact, the Third Circuit's decision, you know, several
11 years after the cases closed in OSG, and so, obviously, it
12 couldn't have served as the model, a cautionary tale or
13 anything of the like.

14 And the idea that the principle of EFH, which is
15 that it is possible to make an individual, by its showing,
16 should somehow be read to allow unmanifested asbestos
17 claimants to assert their proofs of claim against debtors
18 into perpetuity, would be contrary to the provisions of the
19 Bankruptcy Code, where there is no requirement for a 524(g)
20 trust. It would be contrary and effectively would overrule
21 Grossman's, which clearly is not what the Third Circuit
22 intended to do in EFH. And so, I believe that EFH simply
23 does not carry the weight that the Susinos would like it to.

24 And maybe just finally on the issue of the efforts
25 of the parties to negotiate and to make efforts to resolve, I

1 will admit there were three letters exchanged, but I think
2 that's -- the time period that that is talking about is
3 really irrelevant to the point that Mr. Susino was allegedly
4 diagnosed, and I think I wrote down 2013. He died in 2018.
5 And, again, no action was taken in the territorial court in
6 the Virgin Islands or in this court at any point until 2021,
7 between three and seven years after the manifestation of the
8 alleged injuries and Mr. Susino's death. And I would submit
9 that that length of delay, irrespective of the other issues
10 we've discussed, is simply not (indiscernible). Thank you,
11 Your Honor.

12 MS. RAMSEY: Your Honor, may I have two last
13 words, if I keep it very brief?

14 THE COURT: If you keep it very brief, thank you.

15 MS. RAMSEY: Thank you, Your Honor.

16 One is, I believe that Mr. Kessler is incorrectly
17 referring to unimpaired claims as unmanifested claims, that
18 is, according to all of the documents. And if the Court were
19 to read the debtor's disclosure statement, it's, again, at 46
20 and 47, it's very clear that the claims that were filed by
21 the bar date that Mr. Kessler is recalling, were unimpaired
22 claims. Those are present claims where there's an indication
23 of fiber in the lungs, asbestos fiber in the lungs. Those
24 claims are typically not pursued until there is an asbestos
25 disease that has developed. But those folks are on notice

1 that they might develop an asbestos disease, and so in order
2 to preserve the statute, they filed claims. That is
3 different than an unmanifested claimant, who has absolutely
4 no knowledge that they're going to develop an injury in the
5 future.

6 And the second is with respect to Mr. Susino and
7 the assertion, well, we can't find him in our records, and,
8 you know, questions of -- you know, it sounds like almost an
9 argument that he didn't file within the statute of
10 limitations, although I haven't heard it said that way, those
11 are defenses that can be raised and addressed by a Trial
12 Court and appropriately can be; again, OSG can defend on any
13 basis that it believes it has if these cases were to proceed.

14 And then, finally, I think the statement regarding
15 Grossman's is incorrect. Grossman's specifically did
16 indicate that latent claimants are -- can be diagnosed for
17 many, many years and that in the asbestos context, the fact
18 that latency is both, been very delayed in being manifested
19 and, therefore, in those individuals being able to make a
20 claim is to be anticipated. Thank you.

21 THE COURT: Okay. I have one question of you,
22 Ms. Ramsey, because I think Mr. Kessler made a misstatement.
23 He suggested that Mr. Susino did not get the diagnosis about
24 exposure or got the diagnosis in 2012 or 2013, but I think in
25 your papers, it suggested not until 2017, did he know.

1 MS. RAMSEY: That's correct. I think that was a
2 misstatement, Your Honor; yes, that is correct, he was not
3 diagnosed until 2017.

4 MR. KESSLER: I apologize, Your Honor. I have it
5 written down incorrectly in my notes.

6 THE COURT: All right. Thank you.

7 All right. Well, let me make my ruling. Well,
8 you certainly both made me go back and reeducate myself on
9 asbestos claims.

10 But just to set my ruling, in contest before the
11 Court are the motions of Ms. Susino to reopen the case,
12 modify the discharge injunction to permit her to file a late
13 proof of claim and pursue insurance, and the debtor's
14 objection to those motions and its cross-motion to abstain,
15 in part.

16 The claimant asked the Court to allow her late-
17 filed claim because she did not have actual notice of the bar
18 date, did not have actual notice that she had a claim,
19 through her father had a claim, and as the colloquy about the
20 timing of the diagnosis makes it clear that any knowledge
21 that there might be a claim, did not arise until 2017, which
22 is long after the filing of the debtor's case, long after the
23 bar date, long after the filing and confirmation of the
24 debtor's plan, and even long after the case was closed.

25 The debtor contends that it provided the requisite

1 publication notice because Ms. Susino was an unknown creditor
2 and that there are legions of cases that say that unknown
3 creditors are entitled only to publication notice and that
4 the provision of publication notice will allow the discharge
5 of those claims.

6 Ms. Susino asserts that the notice, the
7 publication notice was not adequate because it was not
8 designed to reach a creditor, such as her father, who was a
9 common, able-bodied seaman or laborer, who had served on the
10 debtor's vessels, but lived in Italy. And she points to
11 publication notices in asbestos cases that she asserts are in
12 stark contrast to the publication notice that the debtor has
13 provided here.

14 The Court agrees with Ms. Susino here, that the
15 publication notice was not adequate with respect to the type
16 of claim at issue here. I note that in asbestos cases,
17 particularly, publication notice is far more extensive. EFH
18 does detail the notice provided in that case and while it was
19 provided or issued long after the debtor's publication
20 notice, there are many other cases, such as the Flintkote
21 decision, which evidenced a publication notice in 87
22 publications in the United States, 41 in Canada, as well as
23 other efforts to get notice to unmanifested asbestos
24 claimants that they might have a claim and will be required
25 to file a claim.

1 In this case, the publication was once in only
2 three publications and according to the creditors, not
3 published in any publication that a common laborer or able-
4 bodied seaman, who had served on the debtor's vessels, could
5 honestly be expected to have read. I don't expect seamen
6 read the *Financial Times* or even industry publications to
7 shipbuilders.

8 And I think that the Third Circuit in both,
9 Grossman's and EFH, point out the difficulties that debtors
10 face when dealing with asbestos claims, particularly,
11 unmanifested claims. They point out that 524(g) avoids the
12 risk of having to rely on publication notice and that a
13 debtor who does not take advantage of 524(g) runs the risk
14 that despite the passage of the bar date, late-filed, future
15 asbestos claims can be allowed, even where publication notice
16 was appropriate, under the excusable neglect standard
17 articulated by the Supreme Court in Pioneer.

18 Excusable neglect allows a creditor to file a late
19 claim, even if the creditor has been careless; in fact,
20 that's what negligence means. And while it's stated that it
21 must be excusable, as pointed out by the Third Circuit in
22 EFH, the Pioneer standard is a low threshold to meet the
23 Pioneer standard. It is low in asbestos cases and latent-
24 asbestos claims. Applying the Pioneer standards here,
25 there's no contention that the creditor did not act in good

1 faith and I find that she did.

2 The reason for the delay is that the creditor did
3 not know it had a claim until long after the bar date
4 confirmation and closing of the case, and, again, that is
5 understandable and not unusual in asbestos cases, because the
6 damage of exposure to asbestos has a particularly long latent
7 period. And the Third Circuit in Grossman's acknowledged
8 that persons in the exposure-only category may not even know
9 of their exposure, may not realize the extent of the harm
10 they have incurred, or even if they fully appreciate the
11 significance of the notice they did receive, may not have the
12 informational foresight needed to decide that they should
13 file a claim.

14 So, in this case, the Court finds that the reason
15 for the delay is understandable and a legitimate one. The
16 length of the delay is substantial: more than eight years
17 since the bar date, seven years since confirmation, and four
18 years since the cases were closed. But, once again, that is
19 not unusual for asbestos, unmanifested-asbestos claims and,
20 in fact, is to be expected, quite frankly, and that is why
21 EFH makes it clear that a process of allowing a late claim on
22 a Rule 3003 and just general equitable standards provides
23 what, otherwise, would be a forfeiture of unmanifested
24 asbestos claimants' rights.

25 And I think it's particularly important to note

1 here -- it was not raised by the parties -- but it appears
2 the debtor has suggested that 524 is not required to be used
3 by all debtors that may have an asbestos problem and that is
4 absolutely true. And, in fact, I place no blame on the
5 debtor for not using a 524(g) trust in this case, because
6 based on the disclosure statement, it appears that the
7 debtor's financial problems were not caused by asbestos
8 claims, but, instead, were caused by, among other things, the
9 need to restate its financial statements and the impending
10 maturity on its debt obligations. And it's, I think, though,
11 of significance that because of that, the plan provided that
12 asbestos claims that were not otherwise disallowed in the
13 bankruptcy case, would pass through, unimpaired, by the plan.

14 So, I think that in considering that, I think that
15 the danger of prejudice to the debtor weighs in favor of the
16 creditor. The debtor did take the risk that unmanifested-
17 asbestos claims that were not disallowed in this bankruptcy
18 case, may nonetheless, still be asserted against it because
19 they were unimpaired. And the debtor also took the risk
20 that, as stated in Grossman's and later in EFH, that
21 unmanifested asbestos claimants may have a process to allow
22 their late claims under Bankruptcy Rule 3003.

23 And, therefore, as the EFH Court said, the fact
24 that there is this process which would allow late claims,
25 cannot be held to alter the expectation of the debtor or the

1 other parties in the bankruptcy case, cannot alter their
2 expectations that confirmation or a discharge in confirmation
3 order would protect them, because that would not be a
4 reasonable expectation.

5 And the late claims' potential impact on judicial
6 proceedings, I conclude, is slight here, just as EFH
7 concluded it was slight in that case.

8 The fact that the plan of reorganization was
9 confirmed and the case has been closed actually helps these
10 latent creditors because there will be absolutely no impact
11 on OSG's bankruptcy proceedings now because those bankruptcy
12 proceedings are concluded.

13 Accordingly, I will grant the motions to reopen
14 the case, modify the discharge, and allow the Ms. Susino to
15 file a late proof of claim, having met the excusable neglect
16 standard of Pioneer.

17 And I will deny the debtor's cross-motion to
18 enforce the confirmation order; however, I will grant the
19 debtor's motion to abstain, in part, and I agree with the
20 debtor's articulation of the standard of permissive
21 abstention. I will abstain from considering the other
22 objections that the debtor may have to the Susino claim.

23 Because it is a PI claim, I don't have
24 jurisdiction to determine the amount of that claim and there
25 is a pending case already filed in the Virgin Islands dealing

1 with the allowance of that claim, and the Virgin Islands
2 Superior Court is perfectly capable of considering that claim
3 and any defenses, other than the bankruptcy defenses or
4 issues that I have disposed of in this ruling.

5 I would ask the parties to submit a form of order
6 consistent with this ruling under certification of counsel.

7 MR. KESSLER: Very well, Your Honor. (Audio
8 interference) have that submitted.

9 THE COURT: All right. Anything else, though,
10 today, I think not?

11 MS. RAMSEY: That's it from the Susinos. Thank
12 you, Your Honor.

13 THE COURT: All right. Thank you.
14 We'll stand adjourned, then.

15 MR. KESSLER: Thank you, Your Honor.

16 (Proceedings concluded at 3:26 p.m.)

17 CERTIFICATE

18
19 I certify that the foregoing is a correct transcript
20 from the electronic sound recording of the proceedings in the
21 above-entitled matter.

22
23 /s/Mary Zajackowski October 1, 2021
Mary Zajackowski, CET**D-531

24
25 /s/William J. Garling October 1, 2021
William J. Garling, CE/T 543

DECLARATION OF DANA NYE

I, Dana Nye, hereby declare as follows:

1. I have personal knowledge of the facts set forth below and, if called to testify, I would and could competently testify thereto. I am the President of Ben Nye Co., Inc., debtor and debtor in possession in the above captioned bankruptcy case (the “Debtor”) and manage the day-to-day operations and affairs of the Debtor. Based on the foregoing, I am familiar with and knowledgeable about the operations and financial records of the Debtor.

2. I submit this declaration in support of the *Motion For An Order: (1) Setting Bar Dates For Filing Proofs Of Claim Arising From Asserted Asbestos Related Injuries And (2) Approving Form And Manner Of Notice Of The Bar Date For The Filing Of Asserted Asbestos Related Injury Proof Of Claims* (the “Motion”) to which this declaration is attached.

3. Ben Nye Co., Inc., a California corporation, (the “Debtor” or “BNC” or “Company”) commenced its bankruptcy case by filing a voluntary petition under chapter 11 of title 11, sections 101 *et seq.* of the United States Code (the “Bankruptcy Code”) on March 11, 2024, (the “Petition Date”). The Debtor elected subchapter V on its bankruptcy petition and is a small business debtor as defined by 11 U.S.C. § 1182(1). The Debtor continues to manage its financial affairs, operate its business, and administer its bankruptcy estate as a debtor in possession pursuant to sections 1182(2) and 1184 of the Bankruptcy Code.

A. General Background

4. The Debtor was founded in 1966 by Ben Nye, Sr., a renowned make-up artist whose career spanned four decades.

5. Ben Nye Sr. served as makeup director of 20th Century Fox Studio (“Fox Studio”) for 23 years and supervised the production of over 500 feature films. He worked on the iconic "Gone with the Wind", making up Olivia de Havilland, Leslie Howard and Hattie McDaniel, the first Black actor to win an academy award. In 1968, Ben Nye Sr. was awarded a special Academy Award for Makeup for his last film work on "Planet of the Apes."

6. Based on his vast experience, Ben Nye Sr. developed his own line of professional cosmetics especially formulated for high intensity lighting and durability. He also designed

1 make-up for every skin tone, including a complete line for Black, Hispanic and Asian
2 performers. After he retired from Fox Studio in 1967, he began selling his own line of makeup
3 primarily to film studios.

4 7. In 1970, Ben Nye Sr.'s son, Dana Nye, joined the company as Vice President of
5 Sales and began marketing the Ben Nye make-up line to college and high school drama
6 departments across the country. The Company began advertising in Theatre Craft, an industry
7 magazine circulated to drama departments and theatre companies and began exhibiting at trade
8 shows catering to costume shops and contacting theatre supply houses. Over the years, the
9 Company developed an extensive line of student makeup kits designed for the educational
10 theatre marketplace.

11 8. In May 1975, Ben Nye Sr.'s health declined, and Dana Nye become the
12 Company's President. In July 1979, Dana Nye purchased all of the Company's shares and
13 became the sole shareholder until March 2020, when Dana Nye assigned his BNC shares to the
14 "Dana Nye and Gina Nye, as trustees of the Nye Family Trust U/T/D April 11, 2012."

15 9. As president, Dana Nye has been dedicated to enhancing the quality and image of
16 BNC products. He has traveled extensively exhibiting at trade shows and building a network of
17 authorized dealers, who own brick and mortar stores marketing to the performing arts. The
18 Company's market has not been directed toward the general public, commonly referred to
19 "streetwear" make up.

20 10. The Company is a family business with a good work environment. Of its 35
21 employees, 16 employees have worked there between 11 to 38 years. Excluding the owners, the
22 average service tenure is 13 years. The knowledge and productivity of its employees has been
23 instrumental in developing new products, improving product quality and providing excellent
24 product delivery.

25 11. Today, the Company is considered a leading manufacturer of professional
26 cosmetics, which are sold throughout the United States and abroad. It is recognized for its high
27 quality, extensive product line and excellent customer service.

28 ///

1 **B. The 2017 BNC Revenue Rise and Challenges Thereafter**

2 12. In 2013, the Company had gross revenues of \$8,732,138. In a 2014 interview
3 Kim Kardashian's make-up artist mentioned he used the Company's banana powder on Kim.
4 Given Kim Kardashian's celebrity star status, this interview sparked a surge in public demand
5 for the Company's banana powder and boosted sales of other Company products, resulting in
6 2014 gross revenue of \$10,157,999. In response, however, most of the Company's competitors
7 copied the banana powder, and Kim Kardashian introduced her own line of make-up, as well,
8 cutting deeply into the Company's sales for the next few years. By 2017, the unusually high
9 demand for BNC products subsided, and BNC revenue fell back to the 2013 levels.

10 13. By 2018, long-time brick and mortar dealers began to retire or close business in
11 response to e-commerce. The Company's largest dealers transitioned to expand their on-line
12 business. For the first time, the Company's revenue started to decline, but the business remained
13 marginally profitable.

14 14. In 2020, the impact of the Covid-19 pandemic, hit the Company very hard.

15 15. Covid-19 restrictions shut down the performing arts, and colleges, universities,
16 and Halloween activities stopped. The Covid-19 revenue impact on the Company's business was
17 devastating as the Company's gross revenues fell 42% from the prior year.

18 16. Despite terminating 25% of the Company workforce, managers taking payroll
19 cuts, and the Company cutting all expenses to the bone, the Company incurred a significant net
20 loss of \$718,304 in 2020.

21 17. In the second half of 2021, Covid-19 restrictions eased, and the business started to
22 slowly recover. Although 2021 revenue fell back to the 2005 level, the Company managed an
23 operating income of \$258,102. The Company's net income was significantly boosted to
24 \$2,045,644 from two forgiven PPP loans totaling \$1,182,014, and ERTC filings of \$645,865.

25 18. In 2023, the Hollywood writers' and actors' strikes and an exceptionally weak
26 Halloween season adversely affected the Company's revenue, which declined to \$5,554,300
27 from \$5,809,725 in 2022.

28 ///

1 **C. Asbestos Lawsuits against BNC**

2 19. In December 2004, the Company received a lawsuit filed by Ms. Audrey Giero
3 claiming personal injury from alleged exposure to asbestos allegedly in the Company face
4 powder she used. This was the first lawsuit against the Company for any personal injury claimed
5 from its products. The Company did intensive research and found no evidence of asbestos in its
6 products. The Company did not have insurance for this type of claim and spent about \$50,000 in
7 its defense. The case was dismissed in 2005 without settlement.

8 20. Seventeen years later, and still while weathering the impact of Covid-19, in July
9 2021, the Company received its second lawsuit filed by Mr. David Rody claiming personal
10 injury from alleged exposure to asbestos allegedly in BNC face powder he had used. The
11 Company denies that it manufactured face powders that contained talk with asbestos. In the
12 Rody case, the Company was among 60 defendants and vigorously defended its position,
13 spending \$513,929 in legal fees, including a settlement of \$37,500 in May 2023.

14 21. Since July 2021, the Company has been named as a defendant in eight (8) more
15 asbestos lawsuits. In these lawsuits, the Company is named with multiple defendants, including
16 many very large well-known companies, (e.g., Maybelline LLC, Kaiser Gypsum Company, Inc.,
17 and Walgreen, Co., among many others).

18 22. Asbestos related personal injury lawsuits are complex and expensive to defend,
19 and the Company has no insurance for its defense. The Company legal fees defending these
20 cases have steadily risen. The Company incurred related legal fees of \$62,513 in 2021, \$301,945
21 in 2022, and \$407,289 in 2023. These continued legal fees are unsustainable for the Company.
22 The twin burdens of legal fees and revenue decline outside of the Company's control resulted in
23 a net income loss of \$453,102 for the year ending December 31, 2023. As a result the cash
24 position has been substantially depleted. The Company is a defendant in an asbestos trial
25 scheduled for April 15, 2024, in California. Legal counsel has advised the Company that this
26 trial is likely to incur legal fees between \$400,000 and \$500,000. Such an amount will fully
27 exhaust the Company's present cash position and effectively stop its ability to operate.

Furthermore, the Company would not have any resources to defend against its remaining lawsuits.

23. The Debtor is unaware that it owns any insurance policies that would provide coverage for the Asserted Asbestos Claims. As will be evidenced in the Debtor's to be filed Schedules of Assets and Liabilities, the Debtor is a very small company and has insufficient assets and no source of funding for a Section 524(g) Plan.

D. Proposed Asserted Asbestos Claims Bar Date and Notice Process

24. The Debtor proposes that the Court approve the following proposed claims bar date notice process for holders of all existing and future Asserted Asbestos Claims (the "Proposed Notice Process"):

- A claims bar date for Asserted Asbestos Claims (the "Asserted Asbestos Claims Bar Date") that provides 45 days' notice of the deadline to file proofs of claim, i.e., May 26, 2024.
- The detailed form of notice of the bar date solely for Asserted Asbestos Claims (the "Bar Date Notice") attached hereto as **Exhibit A**.
- Service of the Bar Date Notice by first class U.S. Mail on all of the Debtors' existing and former employees, dealers, and the plaintiffs' counsel in the Actions.
- Publication of the Bar Date Notice in the following publications:
 - i. New York Times – National Edition; publish one time no later than two weeks after entry of the order granting this Motion (the "Order");
 - ii. Los Angeles Times – publish on two dates (no later than two (2) weeks after entry of the Order, and no later than four (4) weeks after entry of the Order);
 - iii. Variety -- publish on two dates (no later than two (2) weeks after entry of the Order, and no later than four (4) weeks after entry of the Order);

iv. Mealey's Litigation Report Asbestos -- publish on three dates (no later than two (2) weeks after entry of the Order, four (4) weeks after entry of the Order, and five (5) weeks after entry of the Order, respectively); and

v. Mealey's Asbestos Bankruptcy Reports -- publish on three dates (no later than two (2) weeks after entry of the Order, four (4) weeks after entry of the Order, and five (5) weeks after entry of the Order, respectively)

25. The Debtor believes that the Proposed Notice Process is robust and will provide both existing and future claimants holding Asserted Asbestos Claims more than adequate notice of the Asserted Asbestos Claims Bar Date. The Proposed Notice Process includes a detailed Bar Date Notice that provides all known and future holders of Asserted Asbestos Claims with the information they need to timely file a proof of claim in the Debtor's bankruptcy case, including the Asserted Asbestos Claim Bar Date, who must file a proof of claim, the filing procedures, the consequences of failing to timely file a proof of claim, and where parties can find further information regarding the Debtor's bankruptcy case. The Debtor will mail the Bar Date Notice directly to known potential holders of Asserted Asbestos Claims by first class U.S Mail. In addition, the Debtor proposes to publish the Bar Date Notice in five (5) publications consisting of a national newspapers (the New York Times) the regional newspaper for the area where the Debtor's manufacturing facility is located (the Los Angeles Times), one of the leading entertainment journals as the Debtor manufactures theatrical make-up (Variety), and two (2)

///

///

///

///

///

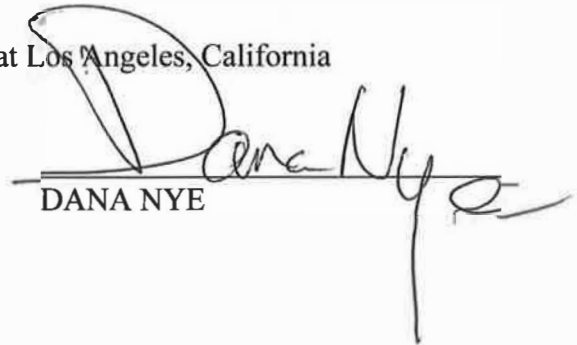
///

///

1 asbestos litigation reporting services used regularly by plaintiffs' firms that bring Asserted
2 Asbestos Claims actions (Mealey's Asbestos Litigation Reports Asbestos and Mealey's Asbestos
3 Bankruptcy Reports). The Debtor proposes to publish the Bar Date Notice multiple times in a 45
4 day period. The expansive Proposed Notice Process is specifically designed to notify all known
5 and future holders of potential Asserted Asbestos Claims of the Asserted Asbestos Claims Bar
6 Date.

7 I declare under penalty of perjury under the laws of the United States of America that the
8 foregoing is true and correct.

9 Executed on this 13 day of March, 2024, at Los Angeles, California

10
11 
12 DANA NYE
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT A

Proposed Bar Date Notice for Asserted Asbestos Claims

UNITED STATES BANKRUPTCY COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BEN NYE CO., INC., BANKRUPTCY CASE, CASE NO. 2:24-bk-11857-DS

**BEN NYE COMPANY DEALERS, FORMER AND CURRENT EMPLOYEES, PLAINTIFFS, AND OTHER PARTIES
IN INTEREST**

**To Keep Your Right To Compensation If You Have Asbestos Related Illness Today Or If You Become Ill
In The Future, You Must Submit A Claim By May 3, 2024, 5:00 p.m. Prevailing Pacific Time.**

A bankruptcy case, under Subchapter V of chapter 11 of the Bankruptcy Code has been filed by the Ben Nye Co., Inc. (the “Company”) in the United States Bankruptcy Court for the Central District of California. The Company designs and manufactures professional cosmetics, including face powder, for the performing arts. The Company sells its product to authorized retailers, and some performing theaters. The Company does not sell its products to the general public.

The Ben Nye Company has been sued by several plaintiffs’ law firms on behalf of parties that allegedly were exposed to asbestos found in talc used in the face powders manufactured by the Company (the “Lawsuits”). The Company is one of several unrelated defendants named in the Lawsuits, and most of the defendants are much larger companies than the Company. The Company denies that it manufactured face powders that contained talc with asbestos. To date, no plaintiff has obtained a judgment against the Company.

The Company has filed its Subchapter V chapter 11 bankruptcy case to obtain a “clean start” by restructuring its debts. Given the allegations in the Lawsuits (which the Company denies) that people have been exposed to asbestos from the manufacture, sale or use of the Company’s face powders, **the Bankruptcy Court has decided that in order to keep your right to compensation if you become ill in the future or have an asbestos-related illness today arising from such exposure, you must submit a claim by May 3, 2024m 5:00 p.m. prevailing Pacific Time (the “Asbestos Claim Bar Date”). Failure to file a claim by the Asbestos Claim Bar Date will result in any existing or future claim against the Company arising from asbestos exposure being barred.**

What is Asbestos?

Asbestos is a fiber which causes asbestos-related disease that can be very serious or fatal and include diseases such as mesothelioma, lung cancer, laryngeal cancer, esophageal cancer, pharyngeal cancer, stomach cancer, and asbestosis, among other diseases. Even if your exposure was many years ago and you are not sick today, this notice could affect you. Asbestos-related illness can occur decades after the exposure to asbestos caused the illness.

How Could this Affect Me?

Given the Lawsuits and even though the Company denies that it ever manufactured, distributed, or sold face powder that contained asbestos, you may believe that you may have been exposed to asbestos from the distribution, use or manufacture of the Company’s face powder. Asbestos exposure is also possible from coming in contact with another person who was exposed to the face powder (for example, if the product was brought home on a family member’s clothing.) You may also file a claim on behalf of a deceased family member.

What do I do Now?

If you believe that you or a family member may have been exposed to asbestos from the manufacture or use of the Company's face powder, you must submit a claim by May 3, 2024, 5 p.m. prevailing Pacific Time. Even if you have not been diagnosed with the disease or experience symptoms, you must make a claim to preserve your right to compensation if you develop asbestos-related illness in the future. Go to <https://www.cacb.uscourts.gov/epoc-electronic-proof-claim> to submit your claim online. To get a paper claim form, call 310.229.3368 for LNBYG. Submitting a claim preserves your right to ask for money if you develop asbestos-related illness in the future. You can submit a claim yourself or you can ask a lawyer to help you. If you are not ill today, completing a claim takes about five minutes.

Will I get Money if I Submit a Claim?

Receiving this notice does not mean that you were exposed to asbestos or that you are eligible to receive money now or in the future. If you are not ill today, submitting a claim keeps your right to receive compensation if you become ill in the future. Further, there is no guaranty that the Company's bankruptcy case will result in recoveries for holders of claims, including asbestos-related claims. Further, since the Company filed a case under Subchapter V of chapter 11 of the Bankruptcy Code and depending on the Company's post-bankruptcy financial projections, it is possible that creditors, including creditors holding asserted asbestos-related claims, will receive little if any recovery from the Company.

What if I do Nothing?

If you do not submit a claim by the Asbestos Claim Bar Date and later manifest asbestos-related disease, you will not be eligible for compensation from the Company. Even if you have not been diagnosed with disease or experiences symptoms, you must make a claim to preserve your right to compensation if you develop an asbestos-related illness in the future.

Getting More Information

If you would like copies of the Company's Schedules of Assets and Liabilities (the "Schedules"), the Bankruptcy Court order setting the Asbestos Claim Bar Date, and other information regarding the Company's bankruptcy case emailed to you, please contact rmc@lnbyg.com. If you have questions call 310.229.3368, email at rmc@lnbyg.com or send a letter to Robert Carrasco, Esq., Levene, Neale, Bender, Yoo & Golubchik LLP, 2818 La Cienega Avenue, LA, CA 90034.

Reservation of the Company's Rights

Nothing contained in this Notice is intended or should be taken as the Company giving up rights to: (a) defend against any claim, filed proof of claim or any claim listed or reflected in the Schedules related to the nature, amount, liability or claim classification thereof; (b) subsequently designate any scheduled claim as disputed, contingent or unliquidated; and (c) otherwise amend or supplement the Schedules.

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is 2818 La Cienega Avenue, Los Angeles, California 90034.

A true and correct copy of the foregoing document entitled **NOTICE OF MOTION AND MOTION FOR AN ORDER: (1) SETTING BAR DATES FOR FILING PROOFS OF CLAIM ARISING FROM ASSERTED ASBESTOS RELATED INJURIES AND (2) APPROVING FORM AND MANNER OF NOTICE OF THE BAR DATE FOR THE FILLING OF ASSERTED ASBESTOS RELATED INJURY PROOF OF CLAIMS; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF DANA NYE IN SUPPORT THEREOF** will be served or was served (a) on the judge in chambers in the form and manner required by LBR 5005-2(d); and (b) in the manner stated below:

1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF): Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On **March 21, 2024**, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

- Robert Carrasco rmc@lnbyg.com, rmc@lnbyg.com
- John-Patrick M Fritz jpf@lnbyg.com, JPF.LNBYB@ecf.inforuptcy.com
- Gregory Kent Jones (TR) gjones@sycr.com, smjohnson@sycr.com; C191@ecfcbis.com; cpeis@stradlinglaw.com
- Eve H. Karasik ehk@lnbyg.com
- Matthew A Lesnick matt@lesnickprince.com, matt@ecf.inforuptcy.com; jmack@lesnickprince.com
- Noreen A Madoyan Noreen.Madoyan@usdoj.gov
- United States Trustee (LA) ustpreion16.la.ecf@usdoj.gov

2. SERVED BY UNITED STATES MAIL: On **March 21, 2024**, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

Ben Nye Co., Inc.
3655 Lenawee Avenue
Los Angeles, CA 90016

Hon. Deborah J. Saltzman
United States Bankruptcy Court
255 E. Temple Street, Suite 1634
Los Angeles, CA 90012

☒ Service information continued on attached page

3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on **March 21, 2024**, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

March 21, 2024

Lisa Masse

/s/ Lisa Masse

Date

Type Name

Signature

Ben Nye Company, Inc.
Asbestos Lawsuits Service List

Counsel for Stacy & Peter Belanger
Water, Kraus & Paul
Attn: M. Camille Hunt
222 N. Pacific Coast Hwy, Ste 1900
El Segundo, CA 90245

Counsel for Claudia Smith
Maune Raichle Hartley French & Mudd
Attn: David Amell and David Rancilio
6101 W. Centinela Ave, Ste 340
Culver City, CA 90230

Counsel for Gary & James Schmidt
Simon Greenstone, Panatier, PC
Attn: Holly Peterson
901 Main Street, Ste 5900
Dallas, TX 75202

Counsel for Gary & James Schmidt
Sieben Polk P.A.
Attn: Chad Alexander and Michael Strom
2600 Eagan Woods Dr, Ste 50
Eagan, MN 55121-1170

Counsel for Gary & James Schmidt
Maune Raichle Hartley French & Mudd
Attn: Managing Partner
1015 Locust Street, Ste 1200
St Louis, Missouri 63101

Counsel for Russell Kolber
The Gori Law Firm
Attn: Sara Salger, Jason Steinmeyer, Erin
Beavers, Martavious Thomas
156 N. Main Street
Edwardsville, IL 62025

Cnsl for Joseph Sniegocki & Robin Watts
Maune Raichle Hartley French & Mudd
Attn: Dawn Besserman
777 S. Harbour Island Blvd, Ste 310
Tampa, FL. 33602

Cnsl for Humberto Machado & Humberto
Machado Jr.
The Gori Law Firm
Attn: Sara Salger, E. Beavers, M. Thomas
156 N. Main Street
Edwardsville, IL 62025

Counsel for Jami & Douglas Sager
The Gori Law Firm
Attn: Sara Salger
156 N. Main Street
Edwardsville, IL 62025

Cnsl for Michell Rusinko & Robert
Weisenfeld
Weitz & Luxenberg, P.C.
Attn: Erin Boyle
220 Lake Drive East, Ste 210
Cherry Hill, NJ 08002